THE HONORABLE STEVE SCOTT

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, et al.

Plaintiffs,

v.

KING COUNTY RECORDS, ELECTIONS AND LICENSING SERVICES DIVISION

Defendant.

NO. 04-2-36048-0 SEA

MOTION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY PERMANENT INJUNCTION SHOULD NOT ISSUE

I. INTRODUCTION

Plaintiffs move for a temporary restraining order ("TRO") and as quickly as possible a permanent injunction to ensure that King County voters are afforded an equal opportunity to have their votes counted. In particular, plaintiffs seek an order requiring defendants (or "King County") to (1) cease treating provisional ballot voters differently than similarly

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

situated absentee and in-person voters in King County and differently than similarly-situated provisional ballot voters in other Washington counties; and (2) comply with Washington law requiring that voter records be available to public scrutiny. The Court's immediate intervention is required to enforce Washington's election laws and the constitutional guarantees of the Washington and United States Constitutions for at least the following reasons:

(1) Plaintiffs will suffer irreparable injury because King County treats provisional ballot voters whose signatures could not be verified under its system differently than do many other Washington counties. Many Washington counties affirmatively contact such voters to provide them with an opportunity to confirm their identity and have their votes counted. King County does not do so with provisional ballot voters. King County provisional ballot voters thus have less chance of having their lawful votes counted than do provisional ballot voters in other Washington counties.

(2) Plaintiffs will suffer irreparable injury because King County treats provisional ballot voters differently than absentee ballot voters, although both are required to sign an envelope into which their envelope is placed. When King County determines that the signature on an absentee ballot envelope does not match its registration database, it affirmatively contacts the absentee voters to provide them with an opportunity to validate their signatures and have their votes counted. It does not do the same for provisional ballot voters. King County provisional ballot voters thus have less chance of having their lawful votes counted than do absentee ballot voters in King County.

(3) King County and other Washington counties do not generally require signature matching for in-person voters on election day. Many lawfully registered voters who appeared to vote on election day were required to use provisional ballots because of

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

mistakes or delays in processing their voter registration or name or address changes or for other reasons beyond their control. Relying only on a signature matching system to validate those provisional ballots, without giving the voter a meaningful opportunity to contest the results of that system, discriminates against such voters and denies them due process.

(4) The disparate treatment of King County provisional ballot voters harms plaintiffs because King County's conduct is likely to affect the outcome of the Governor's race between Democrat Christine Gregoire and Republican Dino Rossi by providing King Count provisional ballot voters, who statistically are more likely to support Gregoire, with less chance of having their lawful votes counted than is true of similarly-situated voters in some other counties.

(5) King County's refusal to allow public scrutiny of a list of provisional ballot voters whose signatures could not be verified violates the Public Disclosure Act, RCW 42.17 and harms plaintiffs because it prevents plaintiffs from attempting to mitigate the injury to their interests and those of King County provisional ballot voters by informing such voters of their right to submit additional information that might validate their lawful votes.

This Motion is supported by the Declarations of David J. Burman ("Burman Decl."); Katherine Dunn ("Dunn Decl."), Christopher Hayler ("Hayler Decl."), and Aravind Swaminathan ("Swaminathan Decl.").

II. RELIEF REQUESTED

Plaintiffs seek to require King County immediately to treat provisional ballot voters the same as absentee ballot voters in King County and provisional ballot voters in some other counties who are affirmatively contacted and given an opportunity to provide information that might validate their lawful vote, in the same manner required by WAC 434-

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

240-235 and WAC 434-240-245. In the alternative, and because plaintiffs recognize the time and resource constraints faced by King County, plaintiffs seek an order requiring King County immediately to make available to the public the list of provisional ballot voters whose signature could not be verified so that plaintiffs and others might contact such voters to allow them to provide information to King County that might validate their lawful votes.

III. FACTUAL BACKGROUND

A. The Washington Gubernatorial Race.

The 2004 elections are the first in which Washington election officials have been required to implement the federal Help America Vote Act, 42 U.S.C. § 15301 *et seq.* ("HAVA"), for federal races, in addition to those mandates of Washington law. The November 2, 2004, contest for Governor was included on a ballot with federal races but was of course not a federal race and has not been decided. The race for Governor is extremely close and is due to be certified on November 17. The Secretary of State estimates that the counties have 85,000 votes to count, of which 25,000 are from King County. *See, e.g.,* http://seattlepi.nwsource.com/local/199178_governor11.html (Appendix A).

B. King County Is Not Attempting to Affirmatively Contact Provisional Ballot Voters Whose Signatures Could Not Be Verified Under the County's System, and It Refuses To Make a List of Such Voters Public.

As is required by Washington law, *see* WAC 434-240-235 and -245, King County contacts absentee voters who failed to sign their absentee ballot envelope or whose signature does not match the registration signature, and it reviews those signatures in a public process in which the identities of such voters are available public records. WAC 434-240-235(3) If those absentee voters return signature cards before 4:30 p.m. on Tuesday, November 16, King County will count their votes.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

King County does not extend the same protections to provisional ballot voters. If a provisional ballot is unsigned or the signature does not match its records under its system, King County posts that information on a website accessible to provisional ballot voters who have retained their provisional ballot stub. King County will not otherwise contact those voters, and, pursuant to its restrictive construction of HAVA, is unwilling to make public a list of such voters similar to what it makes available as to similarly-situated absentee voters.

King County's position with respect to provisional ballots indisputably disenfranchises some lawfully registered voters. Mr. Swaminathan, for example, registered to vote in July 2004 and was directed by King County to vote at the wrong precinct. He dutifully voted a provisional ballot only to learn that his ballot would not be counted because King County was allegedly unable to verify his signature. Swaminathan Decl.. Although Mr. Swaminathan was able to rehabilitate his vote, many other voters are not aware that their votes are in jeopardy. This example also underscores the uncertainties inherent in signature comparison and highlights the need for voters to be directly notified and given a meaningful opportunity to have their vote count.

C. Other Counties Attempt to Provide Provisional Ballot Voters With The Opportunity To Validate Unverified Signatures And/Or Make Public the List of Such Voters.

Other Washington counties have been contacting provisional ballot voters whose signatures could not be verified to allow such voters to provide information that might validate their vote. Dunn Decl. ¶¶ 3-5. Some counties have been making a list of such voters available to the public, so that others can reach out to these voters and urge them to validate their vote. Dunn Decl. ¶ 6; Hayler Decl. ¶ 4. These processes, which are consistent with Washington law, WAC 434-240-235(3), will clearly ensure that voters have ample opportunity to validate their vote.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

IV. LEGAL STANDARDS

To obtain a TRO and preliminary injunction where, as here, notice has been given to the opposing party (*see generally* Burman Decl.), a plaintiff must establish (1) a clear legal or equitable right; (2) a well-grounded fear of an immediate invasion of that right by defendant; and (3) that the acts constituting such an invasion are resulting, or will result, in actual and substantial injury. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209 (2000); *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn.2d 785, 792 (1982). These elements must be reviewed as part of a balancing of the relative interests of the parties, and where appropriate, the interest of the public. *Kucera*, 140 Wn.2d at 209; *Tyler Pipe*, 96 Wn.2d at 792. Here, plaintiffs provide compelling evidence that each of these requirements is satisfied.

V. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CONSTITUTIONAL CLAIMS

A. Washington and Federal Law Require Equal Treatment of Similarly Situated Voters

The Washington Constitution guarantees that "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations. Wash. Const. art. 1 § 12. In addition, the United States Constitution guarantees that "No state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14. Under both clauses, "persons similarly

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

situated with respect to the legitimate purpose of the law must receive like treatment."[1] *State v. Coria*, 120 Wn.2d 156, 169 (1992) (citing *State v. Schaaf*, 109 Wn.2d 1, 17 (1987)). Even in cases where the law itself is valid, if it is "administered in a manner that unjustly discriminates between similarly situated persons, [that administration] violates equal protection." *State v. Gaines*, 121 Wn. App. 687, 705 (2004); *see also Holbrook, Inc. v. Clark County*, 112 Wn. App. 354, 367 (2002) (same).

In analyzing an equal protection claim, strict scrutiny must be applied where the alleged unconstitutional act implicates a fundamental right. *Coria*, 120 Wn.2d at 169. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964);[2] *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter"). Therefore, the strict scrutiny test must be applied in this case. It requires that "the State's purpose must be compelling and the law must be necessary to accomplish that purpose." *Coria*, 120 Wn.2d at 169. Additionally, where strict scrutiny applies:

> [T]he burden shifts to the party seeking to uphold the rule, regulation, or statute "to show the restrictions serve a compelling state interest and are the least restrictive means for achieving the government objective. If no compelling state interest exists, the restrictions are unconstitutional."

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[1] *Tunstall v. Bergeson*, 141 Wn.2d 201, 225 n.20 (2000) ("it is well established that the federal and state equal protection clauses are construed identically and claims arising under their scope are considered as one issue").

[2] All non-Washington authorities are provided to the Court at Appendix B.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

Fusato v. Washington Interscholastic Activities Assn., 93 Wn. App. 762, 768 (1999) (applying strict scrutiny due to disparate impact based on national origin).

To meet their burden, King County must prove both that its interest in avoiding the administrative burden of properly processing provisional ballots or providing plaintiffs with a list of provisional ballots not processed is "compelling" and that those "interests make it ***necessary*** to burden [plaintiffs'] rights" by failing to do so. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (emphasis added). King County will not be able to meet that burden.

B. Washington and Federal Law Require Due Process for Voters

Where an interest is fundamental, government also owes a heightened duty to its citizens not to impair the right without providing substantial due process. *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (due process required state to prove compelling state interest in administration of program that resulted in suppressing protected speech); *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976); *Rhoades v. City of Battle Ground*, 115 Wn.App. 752, 765-66 (Div. 2 2002). Notice by publication is recognized by the law as inferior to direct personal notice for interests of even lesser magnitude than the right to vote. *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) (where city knew name and address of landowner, publication for notice to condemnation proceedings alone was insufficient under due process); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796-98 (1983) (due process required notice reasonably calculated to apprise due to mortgagee 's legally protected property interest). King County provides direct personal notice to absentee ballot voters but refuses to do so for provisional ballot voters, and that refusal denies those voters due process of law.

Moreover, by imposing on provisional ballot voters the burden of a signature-matching requirement, King County has the obligation to assure that the system works in a

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

fashion consistent with the heightened due process standard. King County does not suggest that its systems were free of error in imposing provisional ballots on in-person voters or in analyzing the signatures on their ballot envelopes, and King County therefore has a due process obligation to operate its system in a manner that reasonably attempts to avoid error.

C. Defendants' Interest Is Not Compelling.

For defendants to meet their burden they must show that their interests in refusing to provide direct personal notice and in refusing to allow public transparency to information regarding rejected provisional ballot voters is "compelling." *Anderson v. Celebrezze*, 460 U.S. at 789. The compelling interest standard is highly stringent and requires defendants to prove they have something above and beyond a legitimate interest. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (state scheme for primary elections was "hardly a compelling state interest, if indeed it [was] even a legitimate one"); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982) (restrictions on presenting candidate's ideas to a voter must be "supported by not only a legitimate state interest, but a compelling one..."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (compelling interest test used for most stringent constitutional inquiries, including those regarding statutes which classify citizens by race, alienage or national origin). King County cannot meet this burden.

King County may claim that affirmatively informing voters that their signatures have been questioned by King County's system would be administratively difficult. But administrative convenience is not a compelling interest. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) ("the fact that the implementation of [an affirmative action] program ... might present administrative challenges does not render constitutional an otherwise problematic system"). Moreover, King County affirmatively informs *absentee* voters under the same circumstances, however, and there are many times more absentee ballot voters than

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

provisional ballot voters. King County has simply chosen to treat provisional ballots differently for no compelling reason. That cannot stand; our nation long ago rejected election procedures that "leave the voting fate of a citizen to the passing whim or impulse of an individual registrar." *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (invalidating state law requiring voters to satisfy registrars of their ability to interpret the federal or state constitutions).

D. Avoiding Public Scrutiny of the Rejected Provisional Ballot Voters Is Not Necessary To Any Interest of Defendants.

Even assuming defendants could prove that their interest is compelling, they will be unable to prove that refusing to properly process provisional ballots or to provide the public with a list of rejected provisional ballot voters is ***necessary*** to protect those interests. It is not. Indeed, "any severe restriction [on voting rights must] be narrowly drawn to advance" the state's regulatory interest. *Norman v. Reed*, 502 U.S. 279, 289 (1992) (citing *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Here, Defendants' conduct is hardly necessary to further the County's regulatory interest. A similar disparity between the processing of votes among a State's counties has been struck down by the United States Supreme Court in *Bush v. Gore*. In that case, the court determined that recount mechanisms were arbitrary in violation of voter's fundamental rights because of the absence of specific standards to ensure the equal application of state laws, which were applied differently from county to county. 531 U.S. at 106-107. One of the examples used by the Court is instructive here. By conducting a manual recount of all ballots in certain counties, Florida was giving a second chance to voters who had marked

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

their ballots in such a way as to be read by machine as an overvote and thus not counted. During the manual recount, the election officials would examine the ballot and count it if a clear intent to vote for one candidate was evident. Other voters were not afforded this extra opportunity to have their vote count. The Court held that those circumstances resulted in a violation of equal protection. *Id.*; *see also Gray v. Sanders*, 372 U.S. 368 (1963) (county's vote counting system which resulted in rural votes being weighted more heavily than urban votes violated equal protection); *Moore v. Ogilvie*, 394 U.S. 814 (1969) (same). By failing to accord King County provisional voters the same opportunity that some other counties affords provisional voters and that King County affords absentee voters, the County has made the same kind of mistake as the Florida election officials.

The patent infirmity of King County's conduct is further evident from the fact that "less drastic" alternatives are readily available. *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) ("If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a . . . scheme that broadly stifles the exercise of fundamental personal liberties."). King County could treat the provisional ballots as they do absentee ballots. It could also expose the list of relevant voters to public scrutiny. As detailed below, both comport with Washington law.

VI. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR PUBLIC DISCLOSURE ACT CLAIM

A. Washington State's Public Disclosure Laws Require Defendants to Make a List Available to the Public of Provisional Voters Whose Ballots Have Missing or Mismatched Signatures.

The Public Disclosure Act requires state and local governmental agencies to disclose any public record upon request, unless the record falls within specified statutory exemptions. RCW 42.17.260(1). A public record is defined as "any writing containing information

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.17.020(36).

Voting records are obviously public records. RCW 29A.08.710(2), .720(2) & .730. Holding elections is an essential governmental function; the records generated are prepared and retained by government; and transparency is paramount. The list of rejected provisional voters is no different than the list of rejected absentee voters or the list who in fact voted. The statutory definition of "public record" is a "writing containing information ... regardless of physical form or characteristics." This definition is clearly broad enough to encompass information held in electronic form.

King County is required to produce the information unless it can show that the requested record is subject to a specific exemption. RCW 42.17.340; *Seattle Firefighters Union Local 27 v. Hollister*, 48 Wn. App. 129, 137 (1987) (party objecting to public disclosure bears burden of proof). Any exemption must be narrowly construed. RCW 42.17.251. Even if the party meets this burden, under RCW 42.17. 310(2) the nonexempt portion of the records must still be released.

B. The Help America Vote Act Does Not Prevent King County from Extending the Requested Relief to Provisional Voters.

The only ground for denying public scrutiny that King County has identified to date is Section 302 of the Help America Vote Act ("HAVA"), 42 U.S.C. § 15482. In particular, King County relies on the last sentence of 42 U.S.C. § 15482, which discusses the passive access system that federal law creates as the national floor for provisional ballots and then adds: "Access to information about an individual provisional ballot shall be restricted to the

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

individual who cast the ballot." King County reliance on this provision is misplaced for many reasons.

1. Washington Law, Not HAVA, Controls

Washington State law controls the manner in which ballots – including provisional ballots – are to be processed. *See, e.g.*, RCW 29A.60, *et. seq.* Congress has no power under the federal constitution to regulate state office elections; even as to federal offices the primary role of state law is protected. United States Constitution Art. 1, Sec. 4 ("The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof"). Although the Constitution allows some role for Congress with respect to federal office elections, Congress in HAVA did not try to alter the substance of state office elections. Rather:

> HAVA is quintessentially about being able to *cast* a provisional ballot. No one should be 'turned away' from the polls, but the ultimate legality of the vote cast provisionally is generally a matter of state law. *** The only subsection of HAVA that addresses the issue of whether a provisional ballot will be counted as a valid ballot conspicuously leaves that determination to the States.

Sandusky County Democratic Party v. Blackwell, 2004 WL 2384445 (6th Cir. Oct. 26, 2004) (emphasis in original); *see also Florida Democratic Party v. Hood*, 2004 WL 2414419, *6 (N.D. Fla. Oct. 21, 2004) ("[I]t is entirely reasonable to attribute to Congress a determination to make it easy to submit a provisional ballot to safeguard whatever right the voter had, but to leave to preexisting state law the question of whether the ballot should count, based on whatever facts might ultimately turn out to be. That is what Congress did.").

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

2. Under Washington Law, King County Must Make The List Public.

HAVA leaves it to each state to determine whether and how to count provisional ballots, although each state must adopt uniform and nondiscriminatory standards that define what constitutes a vote. Washington election law promotes two central policies—transparency and full participation—both of which would be advanced by public disclosure of the list provisional ballot voters.

As shown below, Washington's election process is designed to be transparent, allowing the public and political parties access to information concerning voters, and to maximize the likelihood that all lawful votes will be counted. Voter information, including whether or not a voter has voted, is not confidential. The parties, for example, are allowed to designate poll watchers to review lists of registered voters at precincts on election date for the very purpose of determining who has and has not voted. RCW 29A.44.020. Further, the public is allowed to observe all aspects of the canvassing process, including the tabulation of ballots. *See, e.g.,* RCW 29A.60.140(5) (canvass board meetings are public meetings); RCW 29A.60.170 (counting centers must be open to party observers and the public); WAC 434-240-230 (individuals appointed by the parties may observe absentee ballot processing); WAC 434-253-270 ("The counting and tabulation of ballots after the polls close shall be public and may be witnessed by any citizen."); WAC 434-261-010 ("vote tallying process shall be open to the public"); WAC 434-262-025 ("All activities of the canvassing board shall be open to the public..."). Most importantly for the case at hand, Washington law explicitly reserves the public's access to the signature verification process. WAC 434-240-230.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

Transparency in the election process is critical to maintaining its integrity. If the identity of people who voted—and who were denied the right to vote—cannot be determined by third parties, there is no method of ensuring that those entitled to vote were allowed to vote, that they voted only once, that their votes were counted, and that those who were denied the right to vote were properly denied. Unless the information on all voters is publicly available, there is no basis for the public to identify disparate treatment of voters similarly situated, to determine if some voters are voting twice, and to identify a systematic failure by a government agency, such as bad data entry, delayed processing of forms, or incorrect precinct assignment.

Washington law also strongly supports full participation and equal access:

> It is the policy of the state of Washington to encourage every eligible person to register to vote and to participate fully in all elections, and to protect the integrity of the electoral process by providing equal access to the process while guarding against discrimination and fraud. The election registration laws and the voting laws of the state of Washington must be administered without discrimination based upon race, creed, color, national origin, sex, or political affiliation.

RCW 29A.04.205. Toward these ends, defendants must accept provisional ballots even if the required information is not provided on the ballot envelope on election day. *See* WAC 434-253-045 (as amended by WSR 04-18-028 on August 28, 2004) ("No provisional ballot shall be rejected for lack of the information described in this section as long as the voter provides a valid signature and sufficient information to determine eligibility."). No law requires that a valid signature be provided at the time a provisional ballot is cast as opposed to as part of the canvassing process.

Washington law similarly protects the rights of absentee voters. Absentee voters who return an unsigned ballot must be notified and given an opportunity to provide a valid signature. WAC 434-240-235. Absentee voters whose signatures do not match the

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

signature on file with their voter registration must be given an opportunity to update their signature on a new voter registration form. WAC 434-240-245. Furthermore, if an absentee voter votes by provisional ballot at the polls, Washington law states that *the provisional ballot must be counted* as long as the voter did not cast the absentee. WAC 434-240-250. To ensure the integrity of the election process, counties must release to the public lists of absentee voters with signature problems. WAC 434-240-240.

Public disclosure of rejected provisional ballots voters would also advance the policy of full participation by allowing interested groups to ensure that provisional ballot voters learn of the status of their ballots and are advised of the steps necessary to validate the ballots. Just such efforts have been made with respect to *absentee* ballots with similar verification problems. (Hayler Decl. ¶ 4.) A similar effort is planned for the list of rejected provisional ballot voters. (Hayler Decl. ¶ 5, 6).

3. Even If HAVA Applies, King County's Interpretation Is Incorrect

As described above, HAVA does not control determinations regarding the counting of ballots; Washington law does. Even if HAVA did apply, however, Defendants' interpretation of it is incorrect. The provision upon which Defendants may rely requires that state or local election officials:

> establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discovery whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.

Sec. 302(a)(5)(B). The section goes on to state that:

> The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored or otherwise used by the free access system established under paragraph 5(B). Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

Sec. 302(a).

This language was makes sure that states did not inadvertently disclose the substance of how someone voted as a result of this new baseline HAVA website system. Hence the reference to "ballot" rather than "voter" or "voter identity" or "provisional voter identity." Moreover, defendants' construction would mean that even its election workers could not know what they obviously need to know to process provisional ballots. If "individual provisional ballot" means the identity of the voter, and if that information must be restricted to "the individual who cast the ballot," then election officials are prohibited from knowing the provisional ballot voter's identity. Congress could not have meant that, but it is the necessary conclusion of defendants' interpretation. On the other hand, if "individual provisional ballot" means the substance of the individual's ballot, then not even election officials know that, because they separate the identifying information from the ballot before the substance of the ballot is scrutinized. Accordingly, the most logical reading is that Congress meant only to assure that the system it was imposing on the states would not result in disclosure of how someone voted. At most, the plain language restricts the federal restriction of disclosure to the "free access system" and not to the canvassing board process and other voting records under state law.

Further, Congress has directed that HAVA be construed in harmony with the National Voters Registration Act ("NVRA"). *See* 42 U.S.C. 15545(a)(4). The NVRA explicitly requires public access to voter registration information, including the names and addresses of voters that have received notices that they might be removed from voting rolls. Sec. 8(i)(1)-(2). Confidentiality is only explicitly required for individuals who decline to register to vote (Sec. 5(a)(2)(D)(ii); Sec. 7(a)(7); Sec. 9(b)(4)(ii)); and regarding the office at which an applicant submits a voter registration form. Sec. 5(a)(2)(D)(iii); Sec. 9(b)(4)(iii).

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

VII. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT IMMEDIATE INJUNCTIVE RELIEF

Plaintiffs seek to vindicate the right to vote, a right whose "free and unimpaired" exercise is "preservative of other basic civil and political rights." *Reynolds v. Sims,* 377 U.S. 533, 562 (1964); *see also Illinois Bd. of Elections*, 440 U.S. at 184 ("voting is of the most fundamental significance under our constitutional structure"); *ACLU v. Kiffmeyer*, 2004 WL 2428690, *2 (a threat to the right to vote constitutes an irreparable harm). If an injunction is not issued, it is certain that many lawful voters will be denied the right to vote. These voters have no adequate remedy at law. Moreover, there will be no "do over" of today's election, whatever illegalities are found. Plaintiffs do not ask the Court to review the determinations of validity or invalidity as to individual voters; they instead seek to stop defendants from continuing their discrimination against an entire category of voters. Plaintiffs will suffer irreparable harm unless this Court grants immediate injunctive relief.

VIII. A PRELIMINARY INJUNCTION WILL NOT HARM DEFENDANT AND WILL SERVE THE PUBLIC INTEREST

Nothing in the relief plaintiffs request would remotely impair either Defendants' or the public's interests. *See Kiffmeyer*, 2004 WL 2428690 at *2 (balance of harm to potential voters is greatly outweighed any harm to government regarding issuance of provisional ballots and granting a temporary restraining order is in the public interest); *Hood*, 2004 WL 2414419 at *7 ("It is in the public interest that each voter's right to vote be protected against administrative errors."). It is in the public interest that the votes of all eligible voters are counted.

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

IX. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that their motion for a temporary restraining order be granted.

DATED: November 12, 2004.

PERKINS COIE LLP

By _____

David J. Burman, WSBA #10611
Kevin J. Hamilton, WSBA #15648
William C. Rava, WSBA # 29948
Beth A. Colgan, WSBA # 30520
Attorneys for Plaintiffs

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

APPENDIX A

APPENDIX A

SEATTLE POST-INTELLIGENCER
http://seattlepi.nwsource.com/local/199178_governor11.html

Rossi widens lead, but race stays tight

Thursday, November 11, 2004

By ANGELA GALLOWAY
SEATTLE POST-INTELLIGENCER REPORTER

Republican Dino Rossi slightly widened his slim lead in the governor's race yesterday, despite the fact that many of the newly counted votes came from King County, where Democrat Christine Gregoire dominates.

The numbers remain inconclusive nine days after the election, and some observers said it was decreasingly likely that a winner would be declared before Wednesday, when counties must certify their tallies.

Updates 24/7

For the latest returns and election stories, go to the P-I's Election Section

Including the nearly 82,000 additional ballots counted yesterday, Rossi held a lead of about 3,500 votes among the 2.7 million counted since the Nov. 2 election.

"With those numbers, anybody who tries to be a prophet, the seer or a predictor is like the blind man walking down the dark alley," said David Olson, a political science professor at the University of Washington. "I don't know where this one is going to go; no one else knows where it is going to go."

Officials estimate that almost 85,000 ballots remain to be counted, although substantial new tallies won't come in until tomorrow.

In retaining his lead for a second day -- indeed strengthening it slightly -- Rossi surprised many observers and even some in his own camp.

"We expected to be down," said Mary Lane, Rossi's spokeswoman. "So we're happy."

Only Whitman County plans to report more tallies today, according to the Secretary of State's Office.

King County officials counted almost 21,000 ballots yesterday, including nearly 2,000 provisional ballots, which were given to voters who showed up at polls on Election Day but whose names -- for various reasons -- did not appear on that precinct's list of registered voters.

Traditionally, provisional ballots lean Democratic, partly because they are often heavily weighted with college students. However, although Rossi's campaign said it was bracing for many of those to go for Gregoire, Gregoire's campaign insisted they aren't counting on that.

"So few of the provisional have really come in at this point, it's hard to make projections," said Morton Brilliant, her spokesman.

However, Brilliant noted that Rossi lost ground in King County yesterday. "That could be a real problem for him if it continues," he said.

Among the 85,000 estimated ballots left to count, only about 31,000 are in the seven counties where

Gregoire leads, including King County, where she leads by nearly 150,000 votes. However, while Rossi leads in 32 counties, his margin varies widely. In Grays Harbor, for instance, he leads by only 165 votes.

Among large Rossi-leaning counties, 9,200 ballots remain in Pierce County, 8,000 in Snohomish, 7,400 in Spokane and 5,600 in Clark.

P-I reporter Angela Galloway can be reached at 206-448-8333 or angelagalloway@seattlepi.com

APPENDIX B

APPENDIX B

Slip Copy
2004 WL 2428690 (D.Minn.)
(Cite as: 2004 WL 2428690 (D.Minn.))

Only the Westlaw citation is currently available.

United States District Court,
D. Minnesota.

AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA, National Congress of American Indians, and Bonnie Dorr-Charwood, Richard Smith and Tracy Martineau,
Plaintiffs,
v.
Mary KIFFMEYER, in her official capacity as Secretary of State for the State of Minnesota, Defendant.

No. 04-CV-4653 MJR/FLN.

Oct. 28, 2004.

Angela Michele Hall, Robin M. Wolpert, Teresa J. Nelson, Timothy Earle Branson, Vernle C. Durocher, Jr., Dorsey & Whitney, Mpls, MN, for Plaintiffs.

Jeffrey C. O'Brien, Mathew W. Haapoja, Tony P. Trimble, Trimble & Associates, Minnetonka, MN, for Intervenor Plaintiffs.

TEMPORARY RESTRAINING ORDER

ROSENBAUM, J.

***1** This matter is before the Court on the motion of Plaintiffs American Civil Liberties Union of Minnesota, National Congress of American Indians, and Bonnie Dorr-Charwood, Richard Smith and Tracy Martineau ("Plaintiffs") for a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. The Court also heard the emergency motion of Kimani Jefferson and Barry Hickthier to intervene in this proceeding. Having heard the arguments of counsel, and based on all of matters herein, THE COURT HEREBY ORDERS AND FINDS AS FOLLOWS:

FINDINGS OF FACT

1. Minn.Stat. Sec. 201.061 was enacted in 2002 by the Minnesota legislature. The law provides certain requirements for voter registration. Subdivision 3 of the law provides that an applicant for registration may prove residency by showing, among other things, a drivers license or student identification card, by having a registered voter vouch for the applicant, or by using a photographic tribal identification card if the applicant resides on the reservation of a federally recognized tribe and the identification card contains the name, address, photo and signature of the individual.

2. The above provision does not authorize the use of a photographic tribal identification card by American Indian applicants who do not reside on their tribes' reservations, even if those applicants are members of federally recognized tribes and even if the tribal identification cards otherwise meet the requirements that it contain the name, address, photo, and signature of the tribal member.

3. The State argues that the authorization of a photographic tribal identification card by American Indians who reside on their tribes' reservations was an expansion of the registration law intended to broaden the participation of American Indian voters. It argues that such an expansion is not discriminatory against American Indians who do not live on their tribes' reservations.

4. There is no legislative history offered by any of the parties that provides a rational basis to differentiate between the validity of a photographic tribal identification card used by American Indians living on their tribes' reservations and the invalidity of a photographic tribal identification card used by American Indians living off their tribes' reservations.

5. In 2002 Congress enacted the Help America Vote Act, 42 U.S.C. sec. 15301, et. seq., hereinafter referred to as "HAVA." Section 303 of HAVA establishes new requirements for identifying first-time voters who register to vote by mail. The provision states:

[A] State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if--
(A) the individual registered to vote in a jurisdiction by mail; and
(B)(i) the individual has not previously voted in an election for Federal office in the State; or
(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list....
***2** (2) Requirements--(A) In general. An individual meets the requirements of this paragraph if the individual--
(i) in the case of an individual who votes in person--
(I) presents to the appropriate State or local election official a current and valid photo identification; or
(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter....
6. Section 304 of HAVA provides that "nothing in this title shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this title so long as such State requirements are not inconsistent with the Federal requirements under this title ..."
7. In 2004 the Minnesota legislature enacted Minn.Stat. Sec. 201.061, Subd. 1a. This statute provides that, if a person has registered by mail but the registration is not complete, that person may "complete" the registration by one of four methods. None of these methods authorize the voter to complete registration by the use of certain documents recognized by HAVA, namely a bank statement, government check, paycheck, or other government document that shows the name and address of the voter.
8. The Secretary of State has advised the Court that there are less than 600 voters who attempted to register by mail but whose registrations were deemed incomplete. Thus, there are less than 600 individuals in Minnesota who could possibly be impacted by the inconsistency, alleged by Plaintiffs, between Minn.Stat. Sec. 201.061 and HAVA with respect to the upcoming November 2, 2004 election.
9. The Plaintiffs argue that Minn.Stat. Sec. 201.061 is inconsistent with HAVA because it does not authorize the voter to complete registration either by a "current and valid photo identification" or by use of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the individual.

CONCLUSIONS OF LAW

1. Plaintiffs have standing to bring their claims, and the Court has jurisdiction to hear Plaintiffs' claims under 42 U.S.C. Sec.1983, the Supremacy Clause of the Constitution and 28 U.S.C. Sec. 1331.
2. Plaintiffs have met the four (4) predicate requirements for issuance of a temporary restraining order as set forth in *Dataphase System, Inc. v. CL System, Inc.*, 640 F.2d 109, 113 (8th Cir.1981). Specifically, Plaintiffs have shown that (a) there is a threat of irreparable to the movants and the members of the organizational plaintiffs who may not be able to exercise their right to vote on November 2, 2004 unless the Court intervenes, (b) that the balance of harm to the movants and the members of the organizational plaintiffs outweighs any hardship or injury to the defendant if the Court grants the motion, (c) they have a likelihood of success on the merits, and (d) that the granting of the temporary restraining order is in the public interest.
***3** 3. The Court specifically concludes that Plaintiffs have demonstrated that they are likely to succeed on their claim that the authorization in Minn.Stat. 201.061, sub. 3, allowing photographic tribal identification cards to be used as sufficient identification to register to vote on election day, provided the persons are members of federally recognized tribes living on their tribal reservations, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution insofar as it does not also authorize the use of a photographic tribal identification card by American Indians who do not reside on their tribal reservations.
4. The Court specifically concludes that Plaintiffs have demonstrated that they are likely to succeed on their claims that Minn. Rule Part 8200.5100, which authorizes certain forms of photographic

identification cards to be used together with a utility bill, but not a photographic tribal identification card when presented with a current utility bill, violates the Equal Protection Clause of the United States Constitution.
5. Because there is a compelling need to protect the right of the citizenry to vote, and because no monetary relief is involved, there is no need to post a bond, pursuant to Rule 65.
6. This Temporary Restraining Order shall expire in 10 days from the date hereof.
7. The Court reserves the right to amplify on these Findings and Conclusions in a supplemental Order.
8. The motion to intervene remains under advisement.

ORDER

(1) For purposes of Minn.Stat. Sec. 201.061, subd. 3, tribal identification cards that contain the name, address, signature and picture of the tribal member will have the same status as a Minnesota driver license. Therefore, such tribal identification cards are sufficient proof of identity and residency, and may be used without any other documentation to register to vote on election day in the precinct in which the address on the tribal identification card is located, without regard to whether the tribal members live on or off their tribal reservations.
(2) For purposes of Minn. Rule Part 8100.5100, photographic tribal identification cards that do not contain any address or a current address can be used to meet the standards of subpart 2(A). Therefore, a tribal member can use such tribal identification card together with a current utility bill to register to vote on election day in the precinct in which the address on the utility bill is located.
(3) The State shall promptly advise, by electronic mail, County Auditors of the status of tribal identification cards as set forth above, and that the requirements set forth above should be followed on election day November 2, 2004 and thereafter.
(4) The State shall promptly advise, by electronic mail, County Auditors that if there is no challenge notation on the roster, a pre-registered voter may simply sign the roster, and vote in the usual manner, without presenting proof of identity or residency.

*4 (5) With respect to the less than 600 voters who attempted to register by mail but whose registrations were deemed incomplete, the Secretary shall promptly advise, by electronic mail, the Auditors of those counties where these 600 voters are found on the voting roster, that a tribal identification card for such voters that contains the picture and name of the voter, with or without address or signature, shall be accepted as sufficient proof of identity to allow that person's registration to be completed and to allow that person to vote on November 2, 2004.
(6) To effectuate this Order the Court directs the State to promulgate a notice substantially identical to that attached as Exhibit A.

EXHIBIT A

PUBLISHED BY THE MINNESOTA SECRETARY OF STATE

TO: County Auditors, Election Staff and Election Judges

Date: October 29, 2004

RE: Important Changes to Requirements for Proof of Identity on Election Day

For purposes of Minn.Stat. Sec. 201.061, subd. 3, tribal identification cards that contain the name, address, signature and picture of the individual will have the same status as a Minnesota driver license. Therefore, such tribal identification cards are sufficient proof of identity and residency, and may be used without any other documentation to register to vote on election day in the precinct in which the address on the tribal identification card is located, without regard to whether the tribal members live on or off their tribal reservations.

For purposes of Minn. Rule Part 8100.5100, photographic tribal identification cards that do not contain a current address or any address can be used to meet the standards of subpart 2(A). Therefore, such tribal identification cards can be used together with a current utility bill to register to vote on election day in the precinct in which the address on the utility bill is located.

If there is no challenge notation on the voting

roster for a pre-registered voter, that voter may simply sign the roster, and vote in the usual manner, without presenting proof of identity or residency.

[only for Auditors in the counties where the less than 600 voters are located]

Records indicate that one or more persons in your county is listed on the voting roster as a person who must show identification or show ID. For these individuals, and only for these individuals, a tribal identification card for such voters that contains the picture and name of the voter, with or without address or signature, shall be accepted as sufficient proof of identity to allow that person's registration to be completed and to allow that person to vote on November 2, 2004.

2004 WL 2428690 (D.Minn.)

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103 S.Ct. 1564
460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547
(Cite as: 460 U.S. 780, 103 S.Ct. 1564)

Supreme Court of the United States

John B. ANDERSON, et al., Petitioners,
v.
Anthony J. CELEBREZZE, Jr., Secretary of State of Ohio.

No. 81-1635.

Argued Dec. 6, 1982.
Decided April 19, 1983.

Independent candidate for office of President of the United States and three voters brought suit challenging constitutionality of Ohio's early filing deadline for independent candidates. The United States District Court for the Southern District of Ohio, Robert M. Duncan, J., 499 F.Supp. 121, granted petitioners' motion for summary judgment and ordered the Secretary of State of Ohio to place candidates' name on general election ballot, and Secretary appealed. The United States Court of Appeals for the Sixth Circuit, 664 F.2d 554, Cornelia G. Kennedy, Circuit Judge, reversed, and certiorari was granted. The Supreme Court, Justice Stevens, held that Ohio statute requiring independent candidate for office of President to file statement of candidacy and nominating petition in March in order to appear on general election ballot in November placed unconstitutional burden on voting and associational rights of supporters of independent candidate.

Reversed.

Justice Rehnquist dissented and filed opinion in which Justice White, Justice Powell, and Justice O'Connor joined.

West Headnotes

[1] Elections ⚿22
144k22 Most Cited Cases
State has right to require candidates to make preliminary showing of substantial support in order to qualify for place on ballot.

[2] Elections ⚿21
144k21 Most Cited Cases
State has right to prevent distortion of electoral process by device of "party raiding," the organized switching of blocks of voters from one party to another in order to manipulate outcome of other party's primary election.

[3] Constitutional Law ⚿82(8)
92k82(8) Most Cited Cases

[3] Constitutional Law ⚿274.2(3)
92k274.2(3) Most Cited Cases
In resolving constitutional challenges to specific provisions of state's election laws, court must first consider character and magnitude of asserted injury to rights protected by First and Fourteenth Amendments that plaintiff seeks to vindicate; it must then identify and evaluate precise interests put forth by state as justifications for imposing its rule; and, in passing judgment, court must not only determine legitimacy and strength of each of those interests, but also must consider extent to which those interests make it necessary to burden plaintiff's rights. U.S.C.A. Const.Amends. 1, 14.

[4] Constitutional Law ⚿82(8)
92k82(8) Most Cited Cases

[4] Constitutional Law ⚿274.2(3)
92k274.2(3) Most Cited Cases

[4] Elections ⚿22
144k22 Most Cited Cases
In ballot access cases, inquiry is whether challenged restriction unfairly or unnecessarily burdens availability of political opportunity. U.S.C.A. Const.Amends. 1, 14.

[5] United States ⚿25
393k25 Most Cited Cases
Section of Constitution delegating authority to states to regulate election of presidential electors does not give states power to impose burdens on right to vote, where such burdens are expressly prohibited in other constitutional provisions. U.S.C.A. Const. Art. 2, § 1, cl. 2.

[6] Constitutional Law ⚿82(8)
92k82(8) Most Cited Cases

[6] Constitutional Law ⚿91
92k91 Most Cited Cases

[6] Elections ⇐22
144k22 Most Cited Cases
Ohio statute requiring independent candidate for office of President of United States to file statement of candidacy and nominating petition in March in order to appear on general election ballot in November placed unconstitutional burden on voting and associational rights of supporters of independent candidate. Ohio R.C. § 3513.257; U.S.C.A. Const.Amends. 1, 14.

***1565 *Syllabus* [FN*]**

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***780** An Ohio statute requires an independent candidate for President to file a statement of candidacy and nominating petition in March in order to appear on the general election ballot in November. On April 24, 1980, petitioner Anderson announced that he was an independent candidate for President. Thereafter, on May 16, 1980, his supporters tendered a nominating petition and statement of candidacy, satisfying the substantive requirements for ballot eligibility, to respondent Ohio Secretary of State. Respondent refused to accept the documents because they had not been filed within the time required by the Ohio statute. Anderson and petitioner voters then filed an action in Federal District Court, challenging the constitutionality of the statute. The District Court granted summary judgment for petitioners and ordered respondent to place Anderson's name on the general election ballot, holding that the statutory deadline was unconstitutional under the First and Fourteenth Amendments. The Court of Appeals reversed, holding that the early deadline served the State's interest in voter education by giving voters a longer opportunity to see how Presidential candidates withstand the close scrutiny of a political campaign.

Held: Ohio's early filing deadline places an unconstitutional burden on the voting and associational rights of petitioner Anderson's supporters. Pp. 1568-1579.

(a) In resolving constitutional challenges to a State's election laws, a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the interests asserted by the State to justify the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the court in a position to decide whether the challenged provision is unconstitutional. Pp. 1568-1570.

***781 **1566** (b) The Ohio filing deadline not only burdens the associational rights of independent voters and candidates, it also places a significant state-imposed restriction on a nationwide electoral process. A burden that falls unequally on independent candidates or on new or small political parties impinges, by its very nature, on associational choices protected by the First Amendment, and discriminates against those candidates and voters whose political preferences lie outside the existing political parties. And in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest, because the President and Vice President are the only elected officials who represent all the voters in the Nation, and the impact of the votes cast in each State affects the votes cast in other States. Pp. 1570-1573.

(c) None of the three interests that Ohio seeks to further by its early filing deadline justifies that deadline. As to the State's asserted interest in voter education, it is unrealistic in the modern world to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate simply because he lacks a partisan label. Moreover, it is not self-evident that the interest in voter education is served at all by the early filing deadline. The State's asserted interest in equal treatment for partisan and independent candidates is not achieved by imposing the early filing deadline on both, since, although a candidate participating in a primary election must declare his candidacy on the same date as an independent, both the burdens and benefits of the respective

requirements are materially different, and the reasons for early filing for a primary candidate are inapplicable to independent candidates in the general election. And the State's asserted interest in political stability amounts to a desire to protect existing political parties from competition generated by independent candidates who have previously been affiliated with a party, an interest that conflicts with First Amendment values. The Ohio deadline does not serve any state interest "in maintaining the integrity of the various routes to the ballot" for the Presidency, because Ohio's Presidential preference primary does not serve to narrow the field for the general election. *Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714, distinguished. The deadline is not drawn to protect the parties from "intraparty feuding" and may actually impair the State's interest in preserving party harmony. Pp. 1573-1579.

664 F.2d 554, reversed.

***782** *George T. Frampton, Jr.,* argued the cause for petitioners. With him on the briefs were *Mitchell Rogovin, James E. Pohlman,* and *Thomas A. Young.*

Joel S. Taylor argued the cause for respondent. With him on the brief was *William J. Brown,* Attorney General of Ohio.*

* *Arthur N. Eisenberg, Charles S. Sims, Bruce Campbell,* and *John C. Armor* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Paul S. Allen filed a brief for the Libertarian National Committee as *amicus curiae.*

Justice STEVENS delivered the opinion of the Court.

On April 24, 1980, petitioner John Anderson announced that he was an independent candidate for the office of President of the United States. Thereafter, his supporters--by gathering the signatures of registered voters, filing required documents, and submitting filing fees--were able to meet the substantive requirements for having his name placed on the ballot for the general election in November 1980 in all 50 States and the District of Columbia. On April 24, however, it was already too late for Anderson to qualify for a position on the ballot in Ohio and certain other states because the statutory deadlines for filing a statement of candidacy had already passed. The question presented by this case is whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of Anderson's supporters.

The facts are not in dispute. On May 16, 1980, Anderson's supporters tendered a nominating petition containing approximately 14,500 signatures and a statement of candidacy to respondent Celebrezze, the Ohio Secretary of State. These documents would have entitled Anderson to a place on ****1567** the ballot if they had been filed on or before March 20, 1980. Respondent refused to accept the petition solely because it had not been filed within the time required by ***783**§ 3513.257 of the Ohio Revised Code. [FN1] Three days later Anderson and three voters, two registered in Ohio and one in New Jersey, commenced this action in the United States District Court for the Southern District of Ohio, challenging the constitutionality of Ohio's early filing deadline for independent candidates. The District Court granted petitioners' motion for summary judgment and ordered respondent to place Anderson's name on the general election ballot. 499 F.Supp. 121 (SD Ohio 1980).

FN1. Section 3513.257 provides, in pertinent part:
"Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election, except persons desiring to become independent joint candidates for the offices of governor and lieutenant governor, shall file no later than four p.m. of the seventy-fifth day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition as provided in section 3513.261 [3513.26.1] of the Revised Code ...." Ohio Rev.Code Ann. § 3513.257 (Supp.1982).
The Code sets the first Tuesday after the first Monday in June as the date of the

primary election, *id.*, § 3501.01(E), a date that fell on June 3, 1980. Thus the filing deadline for independent candidates was March 20, 1980, a date 229 days in advance of the general election. § 3513.257(A) requires independent candidates in statewide elections, including Presidential primaries, to submit nominating petitions signed by no less than 5,000 and no more than 15,000 qualified voters.

The District Court held that the statutory deadline was unconstitutional on two grounds. It imposed an impermissible burden on the First Amendment rights of Anderson and his Ohio supporters and diluted the potential value of votes that might be cast for him in other States. Moreover, by requiring an independent to declare his candidacy in March without mandating comparable action by the nominee of a political party, the State violated the Equal Protection Clause of the Fourteenth Amendment. The District Court noted that the State did not advance any administrative reasons for the early deadline and rejected the State's asserted justification that the deadline promoted "political stability." Not only did that interest have diminished importance in a Presidential ***784** campaign; it also was adequately vindicated by another statute prohibiting a defeated candidate in a party primary from running as an independent. [FN2]

FN2. Anderson's name had been entered in the Republican primary in Ohio and 26 other States before he made his decision to run as an independent, and he actually competed unsuccessfully in nine Republican primaries. Nevertheless, the parties agree that his timely withdrawal from the Ohio primary avoided the application of the State's "sore loser" statute, Ohio Rev.Code Ann. § 3513.04 (Supp.1982), which disqualifies a candidate who ran unsuccessfully in a party primary from running as an independent in the general election. See 499 F.Supp. 121, 135, 140 (SD Ohio 1980) ; 664 F.2d 554, 556 n. 3 (CA6 1981).

The Secretary of State promptly appealed and unsuccessfully requested expedited review in both the Court of Appeals and this Court, but apparently did not seek to stay the District Court's order. [FN3] The election was held while the appeal was pending. In Ohio Anderson received 254,472 votes, or 5.9 percent of the votes cast; nationally, he received 5,720,060 votes or approximately 6.6 percent of the total. [FN4]

FN3. After the Court of Appeals denied a motion for expedited appeal, respondent filed a petition for a writ of certiorari before judgment in this Court, together with a motion to expedite consideration of the petition. The motion and the petition were both denied before the election in November 1980. 448 U.S. 914, 918, 101 S.Ct. 34, 41, 65 L.Ed.2d 1177, 1181 (1980) . Even though the 1980 election is over, the case is not moot. See *Storer v. Brown,* 415 U.S. 724, 737, n. 8, 94 S.Ct. 1274, 1282, n. 8, 39 L.Ed.2d 714 (1974).

FN4. Ohio Election Statistics 152 (1980); America Votes 14, A Handbook of Contemporary American Election Statistics 19-20 (1981).

The Court of Appeals reversed. It first inferred that the Court's summary affirmances in *Sweetenham v. Rhodes,* 318 F.Supp. 1262 (SD Ohio 1970), summarily aff'd, 409 U.S. 942, 93 S.Ct. 282, 34 L.Ed.2d 214 (1972), and ****1568***Pratt v. Begley,* 352 F.Supp. 328 (ED Ky.1970), summarily aff'd, 409 U.S. 943, 93 S.Ct. 282, 34 L.Ed.2d 214 (1972), had implicitly sustained the validity of early filing deadlines. Then, correctly recognizing the limited precedential effect to be accorded summary dispositions, [FN5] the Court of Appeals independently ***785** reached the same conclusion. It held that Ohio's early deadline "ensures that voters making the important choice of their next president have the opportunity for a careful look at the candidates, a chance to see how they withstand the close ***786** scrutiny of a political campaign." 664 F.2d 554, 563 (CA6 1981).

FN5. The Court of Appeals quite properly concluded that our summary affirmances in *Sweetenham v. Gilligan* and *Pratt v. Begley* were "a rather slender reed" on which to

rest its decision. 664 F.2d, at 560. We have often recognized that the precedential effect of a summary affirmance extends no further than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment. *Illinois Elections Bd. v. Socialist Workers Party,* 440 U.S. 173, 182-183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979); *Mandel v. Bradley,* 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); see *Fusari v. Steinberg,* 419 U.S. 379, 391-392, 95 S.Ct. 533, 540-541, 42 L.Ed.2d 521 (1975) (BURGER, C.J., concurring). Neither *Sweetenham* nor *Pratt* involved state-imposed filing deadlines for Presidential candidates. See Juris. Statement in *Pratt v. Begley,* O.T.1970, No. 70-48, p. 4 (independent candidates for U.S. House of Representatives); Juris. Statement in *Sweetenham v. Rhodes,* O.T.1970, No. 70-15, p. 5 (independent candidates for Governor of Ohio and U.S. House of Representatives). Further, *Sweetenham* arose on review of the District Court's refusal to grant injunctive relief placing appellants on the ballot. The court relied at least in part on appellants' failure to take steps to become candidates before the primary, a date 90 days after the challenged filing deadline, or indeed to tender nominating petitions at any time before filing suit. See *id.,* at 30. In *Pratt,* the District Court dismissed a complaint seeking declaratory as well as injunctive relief, concluding that the early filing deadline was reasonable, but it could have refused to place appellants on the ballot on the equitable ground that they had not submitted nominating petitions until more than two and a half months after the party nominees were chosen in the primary. 352 F.Supp. 328, 329 (ED Ky.1970).

As the Court of Appeals acknowledged, our remand in *Mandel v. Bradley, supra,* does not control this case. Plaintiff, who had sought to run as an independent candidate for United States Senator from Maryland, challenged a Maryland code provision imposing both an early filing deadline and a numerical signature requirement. Neither of the parties addressed the constitutionality of the filing date standing alone. The District Court improperly relied on a prior summary affirmance by this Court to strike down the restriction, and failed to undertake an independent examination of the merits. We remanded for factual findings. *Id.,* 432 U.S., at 177- 178, 97 S.Ct., at 2241. On remand, the District Court found that the early filing deadline imposed unconstitutional burdens on the plaintiff. *Bradley v. Mandel,* 449 F.Supp. 983, 986-989 (Md.1978).

In other litigation brought by Anderson challenging early filing deadlines in Maine and Maryland, the Courts of Appeals for the First and Fourth Circuits affirmed District Court judgments ordering Anderson's name placed on the ballot. See *Anderson v. Quinn,* 495 F.Supp. 730 (Me.1980) , affirmance order, 634 F.2d 616 (CA1 1980); *Anderson v. Morris,* 500 F.Supp. 1095 (Md.1980), aff'd, 636 F.2d 55 (CA4 1980). [FN6] The conflict among the Circuits on an important question of constitutional law led us to grant certiorari. --- U.S. ----, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982). We now reverse.

FN6. Anderson also prevailed on First Amendment and Equal Protection Clause grounds in *Anderson v. Hooper,* 498 F.Supp. 898, 905 (NM 1980), and on state-law grounds in *Anderson v. Mills,* 497 F.Supp. 283 (ED Ky.1980), rev'd in part on other grounds, 664 F.2d 600 (CA6 1981).

I

After a date toward the end of March, even if intervening events create unanticipated political opportunities, no independent candidate may enter the Presidential race and seek to place his name on the Ohio general election ballot. Thus the direct impact of Ohio's early filing deadline falls upon aspirants for office. Nevertheless, as we have recognized, "the rights of voters and the rights of

candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter,* 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972). ****1569** Our primary concern is with the tendency of ballot access restrictions "to limit the field of candidates from which voters might choose." Therefore, "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Ibid.*

The impact of candidate eligibility requirements on voters implicates basic constitutional rights. [FN7] Writing for a unanimous ***787** Court in *NAACP v. Alabama,* 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958), Justice Harlan stated that it "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." In our first review of Ohio's electoral scheme, *Williams v. Rhodes,* 393 U.S. 23, 30-31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968), this Court explained the interwoven strands of "liberty" affected by ballot access restrictions:

> "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights--the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."

As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin v. Panish,* 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at a time when other parties or other candidates are "clamoring for a place on the ballot." *Ibid.; Williams v. Rhodes, supra,* 393 U.S., at 31, 89 S.Ct., at 10. The exclusion of candidates also burdens voters' freedom ***788** of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens. [FN8]

> FN7. In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the "fundamental rights" strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State's restrictions further legitimate state interests. See, *e.g., Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *Lubin v. Panish,* 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974); *Illinois Elections Bd. v. Socialist Workers Party, supra.*

> FN8. See *Williams v. Rhodes, supra,* 393 U.S., at 31, 89 S.Ct., at 10 ("the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes"); *id.,* at 41, 89 S.Ct., at 15 (Harlan, J., concurring in the result) ("by denying the appellants any opportunity to participate in the procedure by which the President is selected, the State has eliminated the basic incentive that all political parties have for conducting such activities, thereby depriving appellants of much of the substance, if not the form, of their protected rights"); *Illinois Elections Bd. v. Socialist Workers Party, supra,* 440 U.S., at 186, 99 S.Ct., at 991 ("an election campaign is a means of disseminating ideas as well as attaining political office.... Overbroad restrictions on ballot access jeopardize this form of political expression.")

[1][2] Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters' rights to associate or to choose among candidates. We have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." ****1570** *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects--at least to some degree--the individual's right to vote and his right to associate with others for political ends. Nevertheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions. [FN9]

> FN9. We have upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself. The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates. *Jenness v. Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971); *American Party of Texas v. White,* 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); cf. *Storer v. Brown, supra,* 415 U.S., at 738-746, 94 S.Ct., at 1283-1286; *Mandel v. Bradley, supra* (remand to assess burden placed by State's signature-gathering requirements on independent candidates). The State also has the right to prevent distortion of the electoral process by the device of "party raiding," the organized switching of blocks of voters from one party to another in order to manipulate the outcome of the other party's primary election. *Rosario v. Rockefeller,* 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973); cf. *Kusper v. Pontikes,* 414 U.S. 51, 59-61, 94 S.Ct. 303, 308-309, 38 L.Ed.2d 260 (1973).
> We have also upheld restrictions on candidate eligibility that serve legitimate state goals which are unrelated to First Amendment values. See *Clements v. Fashing,* 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) (incumbent Justice of the Peace may not seek election to state legislature; persons holding specified state and county offices are deemed automatically to resign from present office if they run for another elective office).

[3] ***789** Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. *Storer, supra,* 415 U.S., at 730, 94 S.Ct., at 1279. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. See *Williams v. Rhodes, supra,* 393 U.S., at 30-31, 89 S.Ct., at 10; *Bullock v. Carter, supra,* 405 U.S., at 142-143, 92 S.Ct., at 855; *American Party of Texas v. White,* 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-1306, 39 L.Ed.2d 744 (1974); *Illinois Elections Bd. v. Socialist Workers Party,* 440 U.S. 173, 183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979). The results of this evaluation will not be automatic; as we have recognized, there is "no substitute***790** for the hard judgments that must be made." *Storer v. Brown, supra,* 415 U.S., at 730, 94 S.Ct., at 1279. [FN10]

> FN10. See *American Party of Texas v. White, supra,* 415 U.S., at 780-781, 94 S.Ct., at 1305-1306; *Illinois Elections Bd.*

v. Socialist Workers Party, supra, 440 U.S., at 188-189, 99 S.Ct., at 992 (BLACKMUN, J., concurring); cf. *Mississippi University for Women v. Hogan,* --- U.S. ----, ----, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982).

II

An early filing deadline may have a substantial impact on independent-minded voters. In election campaigns, particularly those which are national in scope, the candidates and the issues simply do not remain static over time. Various candidates rise and fall in popularity; domestic and international developments bring new issues to ****1571** center stage and may affect voters' assessments of national problems. Such developments will certainly affect the strategies of candidates who have already entered the race; they may also create opportunities for new candidacies. See A. Bickel, Reform and Continuity 87-89 (1971). Yet Ohio's filing deadline prevents persons who wish to be independent candidates from entering the significant political arena established in the State by a Presidential election campaign--and creating new political coalitions of Ohio voters--at any time after mid-to-late March. [FN11] At this point developments in campaigns for ***791** the major-party nominations have only begun, and the major parties will not adopt their nominees and platforms for another five months. Candidates and supporters within the major parties thus have the political advantage of continued flexibility; for independents, the inflexibility imposed by the March filing deadline is a correlative disadvantage because of the competitive nature of the electoral process.

FN11. As Professor Bickel has written: "Never has it been as evident as in 1968 that unforeseen occurrences in the early portion of an election year can fundamentally affect all political expectations. For administrative reasons, there has to be a cutoff date sometime, but there is more than a little of the capricious in laws that force a commitment to act (within or without the major parties) in at least two states before such an upheaval as President Johnson's withdrawal on March 31, 1968, and in many states before important primaries, not to mention such an event as the assassination of Robert F. Kennedy on June 5, 1968." A. Bickel, Reform and Continuity 88 (1971). Indeed, because it takes time for an independent Presidential candidate and his supporters to gather the requisite 5,000 signatures on nominating petitions, the independent must decide to run well in advance of the March filing deadline. In contrast, Ohio law provides for the automatic inclusion of the Presidential nominees of the major parties on the general election ballot, Ohio Rev.Code Ann. § 3505.10 (Supp.1982), even if they have never filed a statement of candidacy in Ohio. Their identities are not established until after the major-party conventions in August.

If the State's filing deadline were later in the year, a newly-emergent independent candidate could serve as the focal point for a grouping of Ohio voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties. As we recognized in *Williams v. Rhodes, supra,* 393 U.S., at 33, 89 S.Ct., at 11, "Since the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected 'group' will rarely if ever be a cohesive or identifiable group until a few months before the election." [FN12] Indeed, several ***792** important third-party candidacies in American history were launched after the two major parties staked out their positions and selected their nominees at national conventions ****1572** during the summer. [FN13] But under § 3513.257, a late-emerging Presidential candidate outside the major parties, whose positions on the issues could command widespread community support, is excluded from the Ohio general election ballot. The "Ohio system thus denies the 'disaffected' not only a choice of leadership but a choice on the issues as well." *Williams v. Rhodes, supra,* at 33, 89 S.Ct., at 11.

FN12. Five individuals were able to qualify as independent Presidential candidates in Ohio in 1980. 499 F.Supp.,

at 143-144. But their inclusion on the ballot does not negate the burden imposed on the associational rights of independent-minded voters. These candidates--Gus Hall of the Communist Party, Richard Congress of the Socialist Workers Party, Deirdre Griswold of the Workers World Party, Ed Clark of the Libertarian Party, and Barry Commoner of the Citizen's Party--represented ideologically-committed minor parties which did not proceed through the "minor party" provisions of the Ohio Election Code. Their candidacies corresponded to the protected First Amendment interests of some Ohio voters. But, unlike Anderson's, they were unlikely adequately to satisfy the voting and associational interests of voters whose independent political leanings crystallized as a result of developments in the course of the primary campaigns. Cf. Developments in the Law--Elections, 88 Harv.L.Rev. 1111, 1143 n. 130 (1975) ("From the standpoint of potential supporters, minor parties and independent candidates differ in that the latter are free from ties and obligations to party organizations, and support for them is not so total a commitment of political allegiance because it does not require renunciation of major party affiliation").
Our focus on the associational rights of independent-minded voters distinguishes the burden imposed by Ohio's early filing deadline from that created by the California disaffiliation provision upheld in *Storer v. Brown, supra.* Although a disaffiliation provision may preclude such voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements.

FN13. See generally App. to Brief of the American Civil Liberties Union as *Amicus Curiae* 10a-12a; A. Bickel, *supra* n. 11, at 87.

Not only does the challenged Ohio statute totally exclude any candidate who makes the decision to run for President as an independent after the March deadline. It also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline. When the primary campaigns are far in the future and the election itself is even more remote, the obstacles facing an independent candidate's organizing efforts are compounded. Volunteers are more difficult to recruit and retain, media publicity and campaign contributions are more difficult to secure, and voters are less interested in the campaign. [FN14]

FN14. See *Bradley v. Mandel, supra,* 449 F.Supp., at 986-987 (findings of fact of 3-judge District Court on remand from this Court).

[4] It is clear, then, that the March filing deadline places a particular burden on an identifiable segment of Ohio's independent-minded voters. See p. 1571, *supra.* As our cases have held, ***793** it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status. [FN15] "Our ballot access cases ... focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens 'the availability of political opportunity.' " *Clements v. Fashing,* 457 U.S. ----, ----, 102 S.Ct. 2836, 2844, 73 L.Ed.2d 508 (1982) (plurality opinion), quoting *Lubin v. Panish, supra,* 415 U.S., at 716, 94 S.Ct., at 1320. [FN16]

FN15. In *Bullock v. Carter, supra,* 405 U.S., at 144, 92 S.Ct., at 856, the Court noted that the disparity in voting power created by high candidate filing fees "cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause." Indeed, the impact fell on an undetermined number of voters. *Id.,* at 149, 92 S.Ct., at 858. Yet the filing fees were unconstitutional because of the "obvious likelihood that this limitation would fall more heavily on the less affluent

segment of the community, whose favorites may be unable to pay the large costs required by the Texas system." *Id.*, at 144, 92 S.Ct., at 856.
See also L. Tribe, American Constitutional Law 774-775 (1978). As Professor Tribe explains, although candidate eligibility requirements may exclude particular candidates, it remains possible that an eligible candidate will "adequately reflect the perspective of those who might have voted for a candidate who has been excluded." *Id.*, at 774 n. 2. But courts quite properly "have more carefully appraised the fairness and openness of laws that determine which political groups can place *any* candidate of their choice on the ballot." *Id.*, at 774. Cf. Developments in the Law--Elections, *supra* n. 12, at 1218, and n. 5.

FN16. In addition, because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny. Developments in the Law--Elections, *supra* n. 12, at 1136 n. 87; see generally *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938); J. Ely, Democracy and Distrust: A Theory of Judicial Review 73-88 (1980).

A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. ***794** It discriminates against those candidates and--of particular importance--against those voters whose political preferences lie outside the existing political parties. *Clements v. Fashing, supra,* 457 U.S., at ----, 102 S.Ct., at 2844 (plurality opinion). By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions ****1573** threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. *Illinois Elections Bd. v. Socialist Workers Party, supra,* 440 U.S., at 186, 99 S.Ct., at 991; *Sweezy v. New Hampshire,* 345 U.S. 234, 250- 251, 77 S.Ct. 1203, 1211-1212, 1 L.Ed.2d 1311 (1957) (opinion of Warren, C.J.). [FN17] In short, the primary values protected by the First Amendment--"a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964)-- are served when election campaigns are not monopolized by the existing political parties.

FN17. See generally V.O. Key, Politics, Parties, and Pressure Groups 278-303 (3d ed. 1952). As Professor Bickel has observed,
"Again and again, minor parties have led from a flank, while the major parties still followed opinion down the middle. In time, the middle has moved, and one of the major parties or both occupy the ground reconnoitered by the minor party; .... [A]s an outlet for frustration, often as a creative force and a sort of conscience, as an ideological governor to keep major parties from speeding off into an abyss of mindlessness, and even just as a technique for strengthening a group's bargaining position for the future, the minor party would have to be invented if it did not come into existence regularly enough." A. Bickel, *supra* n. 11, at 79-80.

[5][6] Furthermore, in the context of a Presidential election, state-imposed restrictions [FN18] implicate a uniquely important ***795** national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. [FN19] Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. [FN20] Similarly, the State has a less important interest in regulating

Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. This Court, striking down a state statute unduly restricting the choices made by a major party's Presidential nominating convention, observed that such conventions serve "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." *Cousins v. Wigoda,* 419 U.S. 477, 490, 95 S.Ct. 541, 549, 42 L.Ed.2d 595 (1975). The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.

FN18. The Constitution expressly delegates authority to the States to regulate the selection of Presidential electors. U.S.Const., Art. II, § 1; see *McPherson v. Blacker,* 146 U.S. 1, 35, 13 S.Ct. 3, 10, 36 L.Ed. 869 (1892). But, as we have emphasized, "we must reject the notion that Art. II, § 1 gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." *Williams v. Rhodes, supra,* 393 U.S., at 29, 89 S.Ct., at 9.

FN19. As the District Court recognized in this case:
"The goal of voters such as plaintiff Eisenstat in states where Anderson will appear on the ballot is to amass enough electoral votes to elect Anderson. Ohio's deadline, by denying Anderson a place on the ballot, removes the sixth largest slate of electors from Anderson's reach and thereby reduces the total pool of electoral votes for which he may compete nationwide by 25 electors." 499 F.Supp., at 126.

FN20. In approximately two-thirds of the States and the District of Columbia, filing deadlines for independent Presidential candidates occur in August or September. The deadlines in a number of other States are in June or July. Anderson was barred by early filing deadlines in Ohio and four other States; he succeeded in obtaining court orders requiring placement on the ballot in all five. See pp. 1567 and 1568, and n. 6, *supra.*

***796** III

The State identifies three separate interests that it seeks to further by its early ****1574** filing deadline for independent Presidential candidates: voter education, equal treatment for partisan and independent candidates, and political stability. We now examine the legitimacy of these interests and the extent to which the March filing deadline serves them.

Voter Education

There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election. Moreover, the Court of Appeals correctly identified that interest as one of the concerns that motivated the Framers' decision not to provide for direct popular election of the President. [FN21] We are persuaded, however, that the State's important and legitimate interest in voter education does not justify the specific restriction on participation in a Presidential election that is at issue in this case.

FN21. "The importance of this interest was made clear at the Constitutional Convention in 1787, where the delegates debated extensively the means of selecting the President. The alternatives that received the most attention in the early debates were appointment by the national legislature and election by the people at large. The former would have made it impossible to guarantee an independent executive. Election by the people was also disfavored, in part because of concern over the ignorance of the populace as to who would be qualified for the job." 664 F.2d, at 563-564.
See *Williams v. Rhodes, supra,* 393 U.S., at 43-44, 89 S.Ct., at 16-17 (Harlan, J., concurring in the result) ("The [Electoral] College was created to permit the most

> knowledgeable members of the community to choose the executive of a nation whose continental dimensions were thought to preclude an informed choice by the citizenry at large.")

The passage of time since the Constitutional Convention in 1787 has brought about two changes that are relevant to the reasonableness of Ohio's statutory requirement that independents formally declare their candidacy at least seven months in advance of a general election. First, although it took days ***797** and often weeks for even the most rudimentary information about important events to be transmitted from one part of the country to another in 1787, [FN22] today even trivial details about national candidates are instantaneously communicated nationwide in both verbal and visual form. Second, although literacy was far from universal in 18th-century America, [FN23] today the vast majority of the electorate not only is literate but is informed on a day-to-day basis about events and issues that affect election choices and about the ever-changing popularity of individual candidates. In the modern world it is somewhat unrealistic to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate simply because he lacks a partisan label.

> FN22. See I A. Beveridge, The Life of John Marshall 250-287 (1916).

> FN23. See K. Lockridge, Literacy in Colonial New England 1-43, 72-87 (1974); L. Soltow & E. Stevens, The Rise of Literacy and the Common School in the United States: A Socioeconomic Analysis to 1870, 28-57 (1981).

Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues. In *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), the Court considered the validity of a Tennessee statute requiring residence in the State for one year and in the county for three months as a prerequisite for registration to vote. The Court held the statute unconstitutional, specifically rejecting the argument that the requirements were justified by the State's interest in voter education.

> "Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is 'necessary' to reside for a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections." *Id.,* at 358, 92 S.Ct., at 1011 (footnotes omitted).

***798** This reasoning applies with even greater force to a Presidential election, which receives ****1575** more intense publicity. [FN24] Nor are we persuaded by the State's assertion that, unless a candidate actually files a formal declaration of candidacy in Ohio by the March deadline, Ohio voters will not realize that they should pay attention to his candidacy. Brief for Respondent 38. The validity of this asserted interest is undermined by the State's willingness to place major-party nominees on the November ballot even if they never campaigned in Ohio.

> FN24. Cf. *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (upholding Act of Congress forbidding States from disqualifying voters in Presidential elections for failure to meet state residency requirements).

It is also by no means self-evident that the interest in voter education is served at all by a requirement that independent candidates must declare their candidacy before the end of March in order to be eligible for a place on the ballot in November. Had the requirement been enforced in Ohio, petitioner Anderson might well have determined that it would be futile for him to allocate any of his time and money to campaigning in that State. The Ohio electorate might thereby have been denied whatever benefits his participation in local debates could have contributed to an understanding of the issues. A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. As we observed in another First Amendment context, it is often true "that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d

346 (1976). [FN25]

FN25. A similar analysis applies to the Court of Appeals' assertion that the State promotes informed voter choices by assuring that the voters are apprised "by a date certain of most of their options." 664 F.2d, at 564-565. This reasoning assumes that the most relevant point of decision occurs in March, although the voter is not actually required to make a final choice among eligible candidates until November. Moreover, as a matter of practical politics, the electoral process contains its own cure for voters' ignorance about a particular candidate. Unknown candidates simply do not win large numbers of votes. A key goal of every political campaign is to promote the candidate's name identification among the electorate.

**799 Equal Treatment*

We also find no merit in the State's claim that the early filing deadline serves the interest of treating all candidates alike. Brief for Respondent 33. It is true that a candidate participating in a primary election must declare his candidacy on the same date as an independent. But both the burdens and the benefits of the respective requirements are materially different, and the reasons for requiring early filing for a primary candidate are inapplicable to independent candidates in the general election.

The consequences of failing to meet the statutory deadline are entirely different for party primary participants and independents. The name of the nominees of the Democratic and Republican parties will appear on the Ohio ballot in November even if they did not decide to run until after Ohio's March deadline had passed, but the independent is simply denied a position on the ballot if he waits too long. [FN26] Thus, under Ohio's scheme, the major parties may include all events preceding their national conventions in the calculus that produces ****1576** their respective nominees and campaign platforms, but ***800** the independent's judgment must be based on a history that ends in March. [FN27]

FN26. It is true, of course, that Ohio permits "write-in" votes for independents. We have previously noted that this opportunity is not an adequate substitute for having the candidate's name appear on the printed ballot.
"It is suggested that a write-in procedure, under § 18600 *et seq.*, without a filing fee would be an adequate alternative to California's present filing-fee requirement.
The realities of the electoral process, however, strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot.... [A candidate] relegated to the write-in provision, would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot." *Lubin v. Panish, supra,* 415 U.S., at 719 n. 5, 94 S.Ct., at 1321 n. 5. Indeed, in the 1980 Presidential election, only 27 votes were cast in the State of Ohio for write-in candidates. Ohio Election Statistics, *supra* n. 4, at 152.

FN27. The Court of Appeals recognized the significance of the flexibility that results from being able to make a later decision, but concluded that the right to select a nominee for the Presidency at a convention conducted in the late summer is a right possessed by the political party, not a right possessed by the nominee personally. "By contrast," the Court reasoned, "the independent's candidacy has no existence apart from that of the candidate, and no interest in flexibility in choosing its nominee." 664 F.2d, at 567. Not only did the Court of Appeals err by ignoring the associational rights of voters who desire to support the independent's candidacy, but its rationale simply has no bearing on the State's asserted "equality" interest.

The early filing deadline for a candidate in a party's primary election is adequately justified by administrative concerns. Seventy-five days appears to be a reasonable time for processing the documents submitted by candidates and preparing the ballot. 499 F.Supp., at 134. The primary date

itself must be set sufficiently in advance of the general election; furthermore, a Presidential preference primary must precede the national convention, which is regularly held during the summer. Finally, the successful participant in a party primary generally acquires the automatic support of an experienced political organization; in the Presidential contest he obtains the support of convention delegates.

Neither the administrative justification nor the benefit of an early filing deadline is applicable to an independent candidate. Ohio does not suggest that the March deadline is necessary to allow petition signatures to be counted and verified or to permit November general election ballots to be printed. [FN28] In addition, the early deadline does not correspond ***801** to a potential benefit for the independent, as it does for the party candidate. After filing his statement of candidacy, the independent does not participate in a structured intraparty contest to determine who will receive organizational support; he must develop support by other means. In short, "equal treatment" of partisan and independent candidates simply is not achieved by imposing the March filing deadline on both. As we have written, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson,* 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971).

> FN28. Respondent conceded in the District Court that the nominating petitions filed on March 20 remain unprocessed in his office until June 15, when he transmits them to county boards of election. The boards do not begin to verify the signatures until the period July 1 to July 15. Finally, the Secretary of State does not certify the names of Presidential candidates, including independents, for inclusion on the ballot until late August, after the party nominating conventions. According to the District Court, based on the stipulated facts, it appears that no more than 75 days are necessary to perform these tasks. 499 F.Supp., at 133-134, 142.

Political Stability

Although the Court of Appeals did not discuss the State's interest in political stability, that was the primary justification advanced by respondent in the District Court, 499 F.Supp., at 134, and it is again asserted in this Court. The State's brief explains that the State has a substantial interest in protecting the two major political parties from "damaging intraparty feuding." Brief for Respondent 41. According to the State, a candidate's decision to abandon efforts to win the party primary and to run as an independent "can be very damaging to state political party structure." Anderson's decision to run as an independent, the State argues, threatened to "splinter" the Ohio Republican party "by drawing away its activists to work in his 'independent' campaign." *Id.,* at 37; see *id.,* at 44.

Ohio's asserted interest in political stability amounts to a desire to protect existing political parties from competition--competition for campaign workers, voter support, and other campaign resources--generated by independent candidates who have previously ****1577** been affiliated with the party. [FN29] Our ***802** evaluation of this interest is guided by two of our prior cases, *Williams v. Rhodes, supra,* and *Storer v. Brown, supra.*

> FN29. This particular interest in "political stability" must not be confused with the interest that is implicated by rules designed to prevent "party raiding," see n. 9, *supra.* That interest, sufficient to sustain the challenged restriction in *Rosario v. Rockefeller, supra,* is applicable only to party primaries; but this case involves restrictions on access to the general election ballot. Nor is it the same interest that justifies a rule disqualifying a person who voted in a party primary from signing a petition supporting the candidacy of an independent. Such a rule reflects a "policy of confining each voter to a single nominating act--either voting in the party primary or a signature on an independent petition." *Storer v. Brown, supra,* 415 U.S., at 743, 94 S.Ct., at 1285; see *American Party of Texas v. White, supra,* 415 U.S., at 785- 786, 94 S.Ct., at 1308.

In *Williams v. Rhodes* we squarely held that

protecting the Republican and Democratic parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena. Addressing Ohio's claim that it "may validly promote a two-party system in order to encourage compromise and political stability," we wrote:

> "The fact is, however, that the Ohio system does not merely favor a 'two-party system'; it favors two particular parties--the Republicans and the Democrats--and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." *Williams v. Rhodes, supra,* 393 U.S., at 23, 31-32, 89 S.Ct., at 10-11.

Thus in *Williams v. Rhodes* we concluded that First Amendment values outweighed the State's interest in protecting the two major political parties.

On the other hand, in *Storer v. Brown* we upheld two California statutory provisions that restricted access by independent ***803** candidates to the general election ballot. Under California law, a person could not run as an independent in November if he had been defeated in a party primary that year or if he had been registered with a political party within one year prior to that year's primary election. We stated that "California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government," and that destruction of "the political stability of the system of the State" could have "profound consequences for the entire citizenry." 415 U.S., at 736, 94 S.Ct., at 1282. Further, we approved the State's goals of discouraging "independent candidacies prompted by short-range political goals, pique, or personal quarrel." *Id.,* at 735, 94 S.Ct., at 1281.

Thus in *Storer* we recognized the legitimacy of the State's interest in preventing "splintered parties and unrestrained factionalism." But we did not suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters. [FN30] Political competition that draws resources away from the major parties cannot, for that reason alone, be condemned as "unrestrained factionalism." Instead, in *Storer* we examined the two challenged provisions in the context of California's electoral system. By requiring a candidate to remain in the intraparty competition once the disaffiliation deadline had passed, and by giving conclusive effect to the winnowing process performed by party members in the primary election, the challenged provisions were an essential part of "a general state ****1578** policy aimed at maintaining the integrity of the various routes to the ballot." Moreover, we pointed out that the ***804** policy "involves no discrimination against independents." *Storer, supra,* at 733, 94 S.Ct., at 1280.

> FN30. Even though the drafting of election laws is no doubt largely the handiwork of the major parties that are typically dominant in state legislatures, it does not follow that the particular interests of the major parties can automatically be characterized as legitimate state interests.

Ohio's challenged restriction is substantially different from the California provisions upheld in *Storer.* As we have noted, the early filing deadline does discriminate against independents. And the deadline is neither a "sore loser" provision nor a disaffiliation statute. [FN31] Furthermore, it is important to recognize that *Storer* upheld the State's interest in avoiding political fragmentation in the context of elections wholly within the boundaries of California. [FN32] The State's interest in regulating a nationwide Presidential election is not nearly as strong; no State could singlehandedly assure "political stability" in the Presidential context. The Ohio deadline does not serve any state interest in "maintaining the integrity of the various routes to the ballot" for the Presidency, because Ohio's Presidential preference primary does not serve to narrow the field for the general election. A major party candidate who loses the Ohio primary, or who does not even run in Ohio, may nonetheless appear on the November general election ballot as the party's nominee. In addition, the national scope of

the competition for delegates at the Presidential nominating conventions assures that "intraparty feuding" will continue until August.

> FN31. Section 3513.257 is a filing deadline, not a "sore loser" statute. It blocks access to the general election ballot 75 days before the primary, at a time when, by definition, no candidate has yet lost the party primary. Ohio has a separate "sore loser" statute, which is admittedly inapplicable to Anderson because he made a timely withdrawal from the Ohio Republican primary. See n. 2, *supra.* Furthermore, as the District Court observed, "it is clear that R.C. 3513.257 acts as a disaffiliation provision only by mere happenstance, not by any reasonably discernible legislative design." 499 F.Supp., at 135.

> FN32. Hall and Tyner, the Presidential and Vice-Presidential candidates, apparently complied with the one-year disaffiliation provision. *Storer, supra,* 415 U.S., at 738, 94 S.Ct., at 1283. The disaffiliation statute was challenged by Storer and Frommhagen, who wished to run as independents for the U.S. House of Representatives.

***805** More generally, the early filing deadline is not precisely drawn to protect the parties from "intraparty feuding," whatever legitimacy that state goal may have in a Presidential election. If the deadline is designed to keep intraparty competition within the party structure, its coverage is both too broad and too narrow. It is true that in this case § 3513.257 was applied to a candidate who had previously competed in party primaries and then sought to run as an independent. But the early deadline applies broadly to independent candidates who have not been affiliated in the recent past with any political party. On the other hand, as long as the decision to run is made before the March deadline, Ohio does not prohibit independent candidacies by persons formerly affiliated with a political party, or currently participating in intraparty competition in other States--regardless of the effect on the political party structure.

Moreover, the early deadline for filing as an independent may actually impair the State's interest in preserving party harmony. As Professor Bickel perceptively observed:

> "The characteristic American third party, then, consists of a group of people who have tried to exert influence within one of the major parties, have failed, and later decide to work on the outside. States in which there is an early qualifying date tend to force such groups to create minor parties without first attempting to influence the course taken by a major one. For a dissident group is put to the choice of foregoing major-party primary and other prenomination activity by organizing separately early on in an election year, or losing all opportunity for action as a third party later." A. Bickel, *supra,* at 87-88.

The same analysis, of course, is applicable to a "dissident group" that coalesces ****1579** around an independent candidate rather than attempting to form a new political party.

We conclude that Ohio's March filing deadline for independent candidates for the office of President of the United ***806** States cannot be justified by the State's asserted interest in protecting political stability.

> "For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. *Dunn v. Blumstein,* 405 U.S., at 343 [92 S.Ct., at 1003]. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP v. Button,* [371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963).] If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper v. Pontikes,* 414 U.S. 51, 59, 94 S.Ct. 303, 308, 38 L.Ed.2d 260 (1973).

IV

We began our inquiry by noting that our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused. Under any realistic appraisal, the "extent and nature" of the burdens Ohio has placed on the

voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline.

The judgment of the Court of Appeals is

Reversed.

Justice REHNQUIST, with whom Justice WHITE, Justice POWELL, and Justice O'CONNOR join, dissenting.

Article II of the Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" who shall select the President of the United States. U.S. Const., art. II, § 1, cl. 2. This provision, one of few in the Constitution that grants an express plenary power to the States, conveys "the broadest power of determination" and "[i]t recognizes that [in the ***807** election of a President] the people act through their representatives in the legislature, and *leaves it to the legislature exclusively to define the method of effecting the object." McPherson v. Blacker,* 146 U.S. 1, 27, 13 S.Ct. 3, 7, 36 L.Ed. 869 (1892) (emphasis added).

In exercising this power, the Ohio legislature has provided alternative routes to its general election ballot for capture of Ohio's Presidential electoral votes. *Political parties* can earn the right to field a Presidential candidate in the general election in one of two ways. Parties that obtained at least 5% of the vote in the preceding gubernatorial or Presidential election are automatically entitled to have a candidate on the general election ballot. Other political parties are required to file 120 days before the primary election (in 1980 the date was February 4) a statement of intent to participate in the primary, together with petitions containing signatures of voters equal to 1% of the votes cast in the last gubernatorial or Presidential election (in 1980 approximately 28,000 signatures would have been required). Ohio Rev.Code § 3517.01.

Ohio also offers *candidates* different routes to the general election ballot. Should a candidate decide to seek the nomination of a political party participating in Ohio's primary election by capturing delegate votes for the party's national convention, the candidate must file a declaration of candidacy and a nominating petition bearing signatures from 1,000 members of the party; the filing must occur no later than the 75th day before the first Tuesday after the first Monday in June of the election year (in 1980 the date was March 20). Ohio Rev.Code § 3513.05. Of course, because a political party has earned the right to put on the ballot a candidate chosen at its national convention, ****1580** a candidate seeking the nomination of that party could forgo the Ohio primary process and, if he should win at the national convention, still be placed on the ballot as a party candidate. If a candidate chooses to run as a nonparty candidate, he must file, by ***808** the same date as a party candidate participating in the primary, a statement of candidacy and a nominating petition bearing the signatures of 5,000 qualified voters. Ohio Rev.Code § 3513.257. Since a nonparty candidate does not participate in a national convention, obviously he cannot benefit from the routes made available to political parties.

Today the Court holds that the filing deadline for nonparty candidates in this statutory scheme violated the First Amendment rights of 1980 Presidential hopeful John Anderson and Anderson's supporters. Certainly, absent a court injunction ordering that his name be placed on the ballot, Anderson and his supporters would have been injured by Ohio's ballot access requirements; by failing to comply with the filing deadline for nonparty candidates Anderson would have been excluded from Ohio's 1980 general election ballot. [FN1] But the Constitution does not require that a State allow any particular Presidential candidate to be on its ballot, and so long as the Ohio ballot access laws are rational and allow nonparty candidates reasonable access to the general election ballot, this Court should not interfere with Ohio's exercise of its Article II, § 1, cl. 2 power. Since I believe that the Ohio laws meet these criteria, I dissent.

> FN1. Anderson would not have been totally excluded from participating in the general election since Ohio allows for "write-in" candidacies. The Court suggests, however, that this is of no relevance because a write-in procedure "is not an adequate substitute for having the

> candidate's name appear on the printed ballot." *Ante,* at 1575 n. 26. Until today the Court had not squarely so held and in fact in earlier decisions the Court had treated the availability of write-in candidacies as quite relevant. See *Storer v. Brown,* 415 U.S. 724, 736 n. 7, 94 S.Ct. 1274, 1282 n. 7, 39 L.Ed.2d 714 (1974).

In support of its conclusion that Ohio's filing deadline "may have a substantial impact on independent-minded voters," *ante,* at 1570, the Court explains that "[i]f the State's filing deadline were later in the year, a newly-emergent independent candidate could serve as the focal point for a grouping of ***809** Ohio voters." *Ante,* at 1571. In addition, the Court says: "Not only does the challenged Ohio statute totally exclude any candidate who makes the decision to run for President as an independent after the March deadline. It also burdens the signature-gathering efforts of independents who decide to run in time to meet the deadline." *Ante,* at 1572. Finally, the Court intimates that the effect of the filing deadline for nonparty candidates is that election campaigns are "monopolized by the existing political parties." *Ante,* at 1573. While if true these findings might provide a basis for finding a substantial impact on nonparty candidates and their supporters, the Court's conclusions are simply unsupported by the record in this case.

Anderson makes no claim, and thus has offered no evidence to show, that the early filing deadline impeded his "signature-gathering efforts." That alone should be enough to prevent the Court from finding that the deadline has such an impact. A statute "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." *Pullman Co. v. Knott,* 235 U.S. 23, 26, 35 S.Ct. 2, 3, 59 L.Ed. 105 (1914). What information the record does contain on this point leads to a contrary conclusion. The record shows that in 1980 five independent candidates submitted nominating petitions with the necessary 5,000 signatures by the March 20 deadline and thus qualified for the general election ballot in Ohio. See *ante,* at 1571, n. 12. The Court of Appeals found that this number of nonparty candidates was not unusual in Ohio. 664 F.2d 554, 565 n. 14 (1981). The importance of this kind of evidence was noted in *Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), where the Court said: "Past experience will be a helpful, if not ****1581** always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Id.,* at 742, 94 S.Ct., at 1285. The most obvious conclusion to be drawn from "past experience" in this case is that a "reasonably diligent independent candidate" choosing to take Ohio's nonparty route has little ***810** difficulty in obtaining the necessary signatures in a timely fashion. See *id.,* at 742, 94 S.Ct., at 1285. [FN2]

> FN2. Furthermore, as the Court of Appeals pointed out, one could speculate that nonparty candidates would have more difficulty meeting the signature requirements of various States if the States had less discretion in setting their own deadlines. "We also note that the effect of limiting the states' discretion would be to require uniformity, thus compressing the signature gathering and campaigning requirements in the various states. This would greatly increase the burden on all candidates, who may presently devote their scarce resources to a few states at a time." 664 F.2d 554, 565 n. 13 (1981).

The Court's intimation that the Ohio filing deadline infringes on a nonparty candidate who makes the decision to run for President after the March deadline is similarly without support in the record. [FN3] Certainly, if such candidates emerge, the Ohio deadline will prevent their running in the general election as nonparty candidates. Just as certainly, however, Anderson was not such a candidate. Anderson formally announced his candidacy for the Presidency on June 8, 1979--over nine months before Ohio's March 20 deadline. And the record does not reveal the existence of any other individual***811** who decided to become a nonparty Presidential candidate after the March 20 deadline. In fact, as noted above, the five individuals who did seek electoral votes through the nonparty alternative had no trouble making this decision before the filing deadline and had no trouble qualifying for a position on the general election ballot.

> FN3. It would seem that realistically

> speaking, there is little chance in these modern times of a serious candidate for the Presidency making his decision to run after the Spring of the election year. We might judicially take notice that it is presently the Spring of the year preceding an election year and numerous candidates have already thrown their hats into the campaign ring. For proof of a contrary point, the Court cites by reference to the candidacies of Martin Van Buren in 1848, James B. Weaver in 1892, Theodore Roosevelt in 1912, and Robert LaFollette in 1924. *Ante,* at 1571 n. 13. The most obvious response is that the method of Presidential campaigning has so changed since the last of these campaigns to believe that such candidacies are not as likely to arise today.
>
> It also should be noted that most, if not all, of these men decided to seek the Presidency far in advance of their actual nomination. Finally, none of these individuals were elected in the years in question and those who split from their political parties may well have been responsible for the election going to a different party, a result which this Court, in *Storer v. Brown,* 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), said States were at liberty to try to avoid.

Finally, there is nothing in the record to indicate that this is a case where "independent-minded voters" are prevented from rallying behind a candidate selected later in the election year so as to guaranty "major parties" a monopoly on the election process. Like-minded voters who do not want to participate in an existing political party are at complete liberty to form a new political party and obtain for themselves the same flexibility that established political parties have in the selection of their nominee for President. It is true that Ohio provides this benefit only where a group of voters acts with some foresight and shows a degree of support among the electorate, but this case presents no challenge to these requirements.

On the record before us, the effect of the Ohio filing deadline is quite easily summarized: it requires that a candidate, who has already decided to run for President, decide by March 20 which route his candidacy will take. He can become a nonparty candidate by filing a nominating petition with 5,000 signatures and assure himself a place on the general election ballot. Or, he can become a party candidate and take his chances in securing a position on the general election ballot by seeking the nomination of a party's national convention. Anderson chose the latter route and submitted in a timely fashion his nominating petition for Ohio's Republican Primary. Then, realizing ****1582** that he had no chance for the Republican nomination, Anderson sought to change the form of this candidacy. The Ohio filing deadline prevented him from making this change. Quite clearly, rather than prohibiting him from seeking the Presidency, the filing deadline only prevented ***812** Anderson from having two shots at it in the same election year.

Thus, Ohio's filing deadline does not create a restriction "denying the franchise to citizens," such as those faced by the Court in *Kramer v. Union School District,* 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583 (1969), *Cipriano v. City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (Per Curiam), *Evans v. Cornman,* 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970), *Phoenix v. Kolodziejski,* 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970), and *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Likewise, Ohio's filing deadline does not create a restriction that makes it "virtually impossible" for new-party candidates or nonparty candidates to qualify for the ballot, such as those addressed in *Williams v. Rhodes,* 393 U.S. 23, 25, 89 S.Ct. 5, 7, 21 L.Ed.2d 24 (1968), *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), and *Lubin v. Panish,* 415 U.S. 709, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974). Yet in deciding this case, we are not without guidance from prior decisions by this Court.

In *Storer v. Brown, supra,* the Court was faced with a California statute prohibiting an independent candidate from affiliating with a political party for 12 months preceding the primary election. This required a prospective candidate to decide on the form of his candidacy at a date some eight months earlier than Ohio requires. In upholding, in the face of a First Amendment challenge, this disaffiliation statute and a statute preventing candidates who had lost a primary from running as

independents, the Court determined that the laws were "expressive of a general state policy aimed at maintaining the integrity of various routes to the ballot," 415 U.S., at 733, 94 S.Ct., at 1280, and that the statutes furthered "the State's interest," described by the Court as "compelling," "in the stability of its political system." *Id.*, at 736, 94 S.Ct., at 1282. The Court explained its holding, saying:

> "The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it ***813** is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.
>
> [The disaffiliation statute] carries very similar credentials. It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. *It works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party.*
>
> A State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist, No. 10 (Madison). *It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling* ****1583*** *and as outweighing the interest the candidate and his supporters may have in making a late rather than early decision to seek independent ballot status....* [T]he Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest ***814** of particular candidates and their supporters having instantaneous access to the ballot." *Id.*, at 735-736, 94 S.Ct., at 1281-1282 (emphasis added).

The similarities between the effect of the Ohio filing deadline and the California disaffiliation statute are obvious.

Refusing to own up to the conflict its opinion creates with *Storer*, the Court tries to distinguish it, saying that it "did not suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters." *Ante*, at 1577. The Court asserts that the Ohio filing deadline is more like the statutory scheme in *Williams v. Rhodes, supra*, which were designed to protect " 'two particular parties--the Republicans and the Democrats--and in effect tends to give them a complete monopoly.' " *Ante*, at 1577 (quoting *Williams v. Rhodes*, 393 U.S., at 32, 89 S.Ct., at 11). See also *ante*, at 1577 ("In *Williams v. Rhodes* we squarely held that protecting the Republican and Democratic parties from external competition cannot justify the virtual exclusion of other political aspirants from the political arena." But see *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (Per Curiam)). "Ohio's asserted interest in political stability," says the Court, "amounts to a desire to protect existing political parties from competition." *Ante*, at 1576. But this simply is not the case. The Ohio filing deadline in no way makes it "virtually impossible," 393 U.S., at 25, 89 S.Ct., at 7, for new parties or nonparty candidates to secure a position on the general election ballot. It does require early decisions. But once a decision is made, there is no claim that the additional requirements for new parties and nonparty candidates are too burdensome. In fact, past experience has shown otherwise. What the Ohio filing deadline prevents is a candidate such as Anderson from seeking a party nomination and then, finding that he is rejected by the party, bolting from the party to form an independent candidacy. This is precisely the same behavior that California sought to prevent by the disaffiliation statute this Court upheld in *Storer*.

***815** The Court makes other attempts to distinguish this case from the obviously similar *Storer* case. The Court says Ohio has no interest in preventing "intraparty feuding" because by the nature of the Presidential nominating conventions " 'intraparty feuding' will continue until August." *Ante,* at 1578. [FN4] This is certainly no different than the situation in *Storer.* Essentially all of the battles for party nominations in California would have taken place during the 12 months before the party primaries; the period during which an independent candidate had to be disaffiliated with any party.

> FN4. The Court seeks comfort from the idea that the filing deadline is not a "sore loser" statute which prevents a candidate who is defeated in a primary from running as an independent candidate. *Ante,* at 1578 n. 31. But the effect of the deadline in this case is much the same. Under the Court's approach, so long as a candidate pulls out of his party race before the votes of the party are counted, he must be recognized as a "newly-emergent independent candidate" whose candidacy is created by a dramatic change in national events. To the contrary, I submit that such a candidate is no more than a "sore loser" who ducked out before putting his popularity to the vote of his party.

The Court further notes that "*Storer* upheld the State's interest in avoiding political fragmentation in the context of elections wholly within the boundaries of California. The State's interest in regulating a nationwide Presidential election is not nearly as strong." *Ante,* at 1578 (footnote omitted). The Court's characterization of the election simply is incorrect. The Ohio general election ****1584** in 1980, among other things, was for the appointment of Ohio's representatives to the Electoral College. U.S. Const., art. II, § 1, cl. 2. The Court throughout its opinion fails to come to grips with this fact. While Ohio may have a lesser interest in who is ultimately selected by the Electoral College, its interest in who is supported by its own Presidential electors must be at least as strong as its interest in electing other representatives. While the Presidential electors may serve a short term and may speak only one time on behalf of the voters they represent, ***816** their role in casting Ohio's electoral votes for a President may be second to none in importance. See *Burroughs v. United States,* 290 U.S. 534, 545, 54 S.Ct. 287, 290, 78 L.Ed. 484 (1934).

The Court suggests that *Storer* is not controlling since in that case the Court held that the California disaffiliation statute was not discriminatory because party candidates were prohibited from affiliating with another political party for the 12 months preceding the primary election. The Court says that Ohio's filing deadline does discriminate against nonparty candidates. But merely saying it is so does not make it so. As explained later, nonparty candidates and party candidates wishing to participate in Ohio's primary election must file on the same date. It is true that party candidates can obtain a place on the general election ballot without participating in the primary by obtaining a party's nomination at its national convention. But this is a benefit given to the party and only incidentally received by the winning party candidate; it provides no benefit to one who seeks but fails to obtain a party nomination. On the whole, party candidates have a more difficult chore in getting a place on the general election ballot than do nonparty candidates; a fact of which Anderson and other unsuccessful rivals for the 1980 Republican nomination are doubtless aware. Nonparty candidates, if they file in time and submit the necessary nominating petitions, are assured of a place on the ballot; party candidates must win a party nomination.

In a final attempt to distinguish *Storer,* the Court argues that even if Ohio is serving some interest in preventing "intraparty feuding," the filing deadline is "both too broad and too narrow;" the Court even argues that the filing deadline may in fact impair this interest. *Ante,* at 1578. The Court claims that the effect of the deadline is too broad because it applies "to independent candidates who have not been affiliated in the recent past with any political party." *Ante,* at 1578. Its effect is too narrow because it "does not prohibit independent candidacies by persons formerly affiliated with ***817** a political party, or currently participating in intraparty competition." *Ante,* at 1578. The Court says the filing deadline may impair the State's interest in preserving political stability because it

may force independent-minded voters " 'to create minor parties without first attempting to influence the course taken by a major one.' " *Ante,* at 1578 (quoting A. Bickel, Reform and Continuity 87-88 (1971)). But *each* of these criticisms could have been asserted against the California disaffiliation statute.

The point the Court misses is that in cases like this and *Storer,* we have never required that States meet some kind of "narrowly tailored" standard in order to pass constitutional muster. In reviewing election laws like Ohio's filing deadline, we have said before that a court's job is to ensure that the State "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." *Jenness v. Fortson,* 403 U.S. 431, 439, 91 S.Ct. 1970, 1974, 29 L.Ed.2d 554 (1971). If it does not freeze the status quo, then the State's laws will be upheld if they are "tied to a particularized legitimate purpose, and [are] in no sense invidious or arbitrary." *Rosario v. Rockefeller,* 410 U.S. 752, 762, 93 S.Ct. 1245, 1252, 36 L.Ed.2d 1 (1973). See also *Marston v. Lewis,* 410 U.S. 679, 93 S.Ct. 1211, 35 L.Ed.2d 627 (1973) (Per Curiam); *Burns v. Fortson,* 410 U.S. 686, 93 S.Ct. 1209, 35 L.Ed.2d 633 (1973) (Per Curiam); *American Party of Texas v. White,* 415 U.S. 767, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); *Mandel v. Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199 (1977) (Per Curiam); *Clements v. Fashing,* 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). The Court tries to avoid the rules set forth in some of ****1585** these cases, saying that such rules were "applicable only to party primaries" and that "this case involves restrictions on access to the general election ballot." *Ante,* at 1576, n. 29. The fallacy in this reasoning is quite apparent: one cannot restrict access to the primary ballot without also restricting access to the general election ballot. As the Court said in *Storer v. Brown:* "The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people ***818** choose their public officers. It functions to winnow out and finally reject all but the chosen candidates." 415 U.S., at 735, 94 S.Ct., at 1281 (footnote omitted).

The Ohio filing deadline easily meets the test described above. In the interest of the "stability of its political system," *Storer v. Brown,* 415 U.S., at 736, 94 S.Ct., at 1282, Ohio must be "free to assure itself that [a nonparty] candidate is a serious contender, *truly independent,* and with a satisfactory level of community support." *Id.,* at 746, 94 S.Ct., at 1286. This interest alone is sufficient to support Ohio ballot access laws which require that candidates for Presidential electors choose their route early, thus preventing a person who has decided to run for a party nomination from switching to a nonparty candidacy after he discovers that he is not the favorite of his party. But this is not the only interest furthered by Ohio's laws.

Ohio maintains that requiring an early declaration of candidacy gives its voters a better opportunity to take a careful look at the candidates and see how they withstand the close scrutiny of a political campaign. The Court does not dispute the legitimacy of this interest. But the Court finds that "the State's important and legitimate interest in voter education does not justify the specific restriction on participation in a Presidential election that is at issue in this case." *Ante,* at 1574. Admitting that the Constitutional Convention in 1787, in establishing the Electoral College and providing plenary authority to the States for election of its members to the College, had a heightened awareness of the importance of an informed electorate, the Court tells us how times have changed in the past 200 years and how the problem of ensuring an informed electorate is no longer so great. The Court explains that "[i]n the modern world it is somewhat unrealistic to suggest that it takes more than seven months to inform the electorate about the qualifications of a particular candidate.... Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Ante,* at 1574.

I cannot agree with the suggestion that the early deadline reflects a lack of "faith" in the voters. That Ohio wants to ***819** give its voters as much time as possible to gather information on the potential candidates would seem to lead to the contrary conclusion. There is nothing improper about wanting as much time as possible in which to evaluate all available information when making an important decision. Besides, the Court's assertion that it does not take seven months to inform the

electorate is difficult to explain in light of the fact that Anderson allowed himself some 19 months to complete this task; and we are all well aware that Anderson's decision to make an early go of it is not atypical. The Court's reliance on the quote from *Dunn v. Blumstein,* 405 U.S., at 358, 92 S.Ct., at 1011, that campaign spending and voter education occurs "largely during the month before an election" cannot be taken seriously when applied to Presidential campaigns. I see no basis whatsoever for the Court's conclusion that "[t]his reasoning applies with even greater force to a Presidential election." *Ante,* at 1574.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo,* 424 U.S., at 14-15, 96 S.Ct., at 632. This is especially true in the context of candidates for President. "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly ****1586** stated." *Burroughs v. United States,* 290 U.S., at 545, 54 S.Ct., at 290. I believe the Court of Appeals aptly explained the present day need in saying:

> "To be sure, some of the impediments to an informed electorate that existed in 1787 have been removed by our extensive present day communications network, through which news of a candidacy is transmitted nationwide virtually simultaneously with its announcement. However, rapid communication can only inform the electorate of the existence of a candidacy. Equally crucial to a meaningful vote is the electorate's ability to evaluate ***820** those who would be President once aware of their desire to fill the post. Ohio may very reasonably conclude that requiring Presidential candidates to be in the public eye for a significant time materially advances its interest in careful selection." 664 F.2d, at 564. [FN5]

> FN5. The Ohio legislature's decision is not that different from the decision by the federal government requiring television networks to provide early access for Presidential candidates. Recently, in *CBS, Inc. v. FCC,* 453 U.S. 367, 101 S.Ct. 2813, 69 L.Ed.2d 706 (1981), this Court held that under the Federal Communications Act a Presidential candidate had a right to television access as early as December, 1979, some 11 months before the election.

Ohio also has an interest in assisting its citizens in apportioning their resources among various candidates running for the Presidency. The supply of resources needed for operating a political campaign is limited; this is especially true of two of the most important commodities, money and volunteers. By doing its best to present the field of candidates by Spring, right at the time that campaigns begin to intensify, Ohio allows those of its citizens who want to provide support other than voting, adequate time to decide how to divide up that support. While the Court does not give attention to this interest, it is certainly a legitimate one and an important one in terms of the effective campaigning of Presidential candidates.

The Court seems to say that even if these interests would otherwise be served by Ohio's filing deadline, they are "undermined by the State's willingness to place major-party nominees on the November ballot even if they never campaigned in Ohio." *Ante,* at 1575. The Court fails to follow its own warning that " '[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.' " *Ante,* at 1576 (quoting *Jenness v. Fortson,* 408 U.S., at 442, 91 S.Ct., at 1976). Underlying the Court's entire opinion is the idea that "independent candidates" are treated differently than candidates fielded by the "major parties." But this observation is no more productive than comparing ***821** apples and oranges and wondering at the difference between them.

First of all, *any political party, major, minor, or otherwise,* can qualify for a position on Ohio's general election ballot and have that position held open until later in the election year. The reasonableness of this approach is fairly obvious. Political parties have, or at least hope to have, a continuing existence, representing particular philosophies. Each party has an interest in finding the best candidate to advance its philosophy in each

election. See *Cousins v. Wigoda,* 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975); *Democratic Party v. LaFollette,* 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). The Court suggests that if such a procedure is so important for political parties, then followers of a particular candidate should also have more time. See, *e.g., ante,* at 1575, n. 27. This argument simply does not wash. Any group of like-minded voters, if they are of sufficient numbers, is free to form a political party and ensure more time in selecting a candidate to express their views. But followers of a particular candidate need no time to find such a representative; they are organized around that candidate. Such followers have no real organized existence in the absence of that particular candidate.

Comparing party candidates and nonparty candidates is somewhat more useful, but does not change the result. Any candidate wanting to pursue his place on the Ohio general election ballot through Ohio's preliminary procedures must file at the same time. Nevertheless, should an individual who has not filed a statement of candidacy ****1587** be chosen by a political party as its nominee, Ohio does not attempt to keep that candidate off of its general election ballot. To the extent that this is an advantage to the successful party candidate, however, it is a benefit given to the party, which the party candidate only receives incidentally. [FN6] Furthermore, ***822** to the extent the party candidate is benefited, such benefit is counterbalanced by the risk he takes of not getting the party nomination at all. Only the nonparty candidate can assure himself of a place on the general election ballot. Many party candidates may seek the party's nomination, but only one of them will get it.

> FN6. The Court says that nevertheless this exposes a serious weakness in the State's claim that it wants to put all the candidates before its voters early so they will have time to evaluate the candidates. Even if the Court were correct, the other interests advanced by the State would justify the filing deadline for nonparty candidates. But I do not believe the Court is correct. The Court ignores the fact that voters learn about a nonparty candidacy only by listening to what the candidate has to say. Reality requires a different conclusion about party candidates. Even before a party candidate is chosen, the public will know a great deal about that candidate because of its knowledge about the party. Of course, the Court is correct that the focus of a party will vary somewhat according to the candidate chosen. But this proves only that the time between the choosing of the party's nominee and the general election should be sufficient to allow the voters to evaluate the party's candidate. It does not prove that the voters need as much time evaluating the party candidate as they need for an individual who does not run as the representative of any particular established views. It would in fact be quite reasonable for a State to require, in furtherance of its voter education interest, that the nonparty candidate put himself before the public at an earlier time than it requires of the party candidate.

The Court's decision in this case is not necessary for the protection of like-minded voters who want to support an independent candidate; Ohio laws already protect such voters. This case presents a completely different story. John Anderson decided some 19 months before the 1980 general election to run for President. He decided to run as a Republican Party candidate. When Anderson sought to get on the Ohio ballot after the March 20 deadline, he was not a "newly-emergent independent candidate" whose candidacy had been created by dramatic changes in the election campaign. He was a party candidate who saw impending rejection by his party and rather than throw his support to the party's candidate or some other existing candidacy, Anderson wanted to bolt and have a second try.

***823** The Court's opinion protects this particular kind of candidate--an individual who decides well in advance to become a Presidential candidate, decides which route to follow in seeking a position on the general election ballot, and, after seeing his hopes turn to ashes, wants to try another route. The Court's opinion draws no line; I presume that a State must wait until all party nominees are chosen and then allow all unsuccessful party candidates to refight their party battles by forming an

"independent" candidacy. I find nothing in the Constitution which requires this result. For this reason I would affirm the judgment of the Court of Appeals.

460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547

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102 S.Ct. 1523
456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732
(Cite as: 456 U.S. 45, 102 S.Ct. 1523)

Briefs and Other Related Documents

Supreme Court of the United States

Carl W. BROWN, Petitioner
v.
Earl J. HARTLAGE.

No. 80-1285.

Argued Jan. 30, 1982.
Decided April 5, 1982.

Action was brought by unsuccessful incumbent against successful candidate for office of county commissioner alleging that candidate violated the Kentucky Corrupt Practices Act and seeking to have election declared void. The Circuit Court, Jefferson County, found that candidate's promise violated Kentucky Corrupt Practices Act but declined to order new election. The Kentucky Court of Appeals, 618 S.W.2d 603, reversed and, after the Supreme Court of Kentucky denied review, petition for certiorari was granted. The United States Supreme Court, Justice Brennan, held that: (1) when state seeks to restrict directly offer of ideas by candidate to voters, First Amendment requires that restriction be demonstrably supported not only by legitimate state interest but compelling one; (2) a candidate's promise to confer some ultimate benefit on voter, qua taxpayer, citizen or member of general public, is not beyond pale of First Amendment protection; and (3) nullifying candidate's election victory because of his pledge to lower commissioners' salaries, in possible violation of the Kentucky Corrupt Practices Act, was inconsistent with the First Amendment.

Judgment of Kentucky Court of Appeals reversed and remanded.

Chief Justice Burger concurred in the judgment.

Justice Rehnquist filed an opinion concurring in the result.

West Headnotes

[1] Constitutional Law ⇐90(1)
92k90(1) Most Cited Cases
Just as state may take steps to ensure that its governing political institutions and officials properly discharge public responsibilities and maintain public trust and confidence, a state has legitimate interest in upholding integrity of electoral process itself but, when state seeks to uphold that interest by restricting speech, limitations on state authority imposed by the First Amendment are manifestly implicated. U.S.C.A.Const.Amends. 1, 14.

[2] Constitutional Law ⇐90.1(1.2)
92k90.1(1.2) Most Cited Cases
(Formerly 92k90.1(1))
When a state seeks to restrict directly offer of ideas by candidate to voters, First Amendment requires that restriction be demonstrably supported not only by legitimate state interest but compelling one and that restriction operate without unnecessarily circumscribing protected expression. U.S.C.A.Const. Amends. 1, 14.

[3] Constitutional Law ⇐90.1(1.2)
92k90.1(1.2) Most Cited Cases
(Formerly 92k90.1(1))
As a state may prohibit giving of money or other things of value to voter in exchange for his support, it may also declare unlawful an agreement embodying intention to make such an exchange; although agreements to engage in illegal conduct undoubtedly possess some element of association, state may ban such agreements without trenching on any right of association protected by the First Amendment and fact that such an agreement necessarily takes form of words does not confer upon it or on underlying conduct constitutional immunities that the First Amendment extends to speech. U.S.C.A.Const. Amends. 1, 14.

[4] Elections ⇐311
144k311 Most Cited Cases
Although some kinds of promises made by a candidate to voters and some kinds of promises

elicited by voters from candidates may be declared illegal without constitutional difficulty, so long as hoped-for personal benefit that allegedly would result from candidate's commitment is to be achieved through normal processes of government, and not through some private arrangement, it has always been and remains reputable basis upon which to cast one's ballot. U.S.C.A.Const.Amend. 1.

[5] Constitutional Law ⇐90.1(1.2)
92k90.1(1.2) Most Cited Cases
(Formerly 92k90.1(1))
County commissioner candidate's promise to reduce his salary if elected was not beyond reach of the First Amendment nor did it invite kind of corrupt arrangement Kentucky might have compelling interest in avoiding where candidate did not offer private payment or donation in exchange for voter support, and thus Kentucky Corrupt Practices Act's prohibition against political candidate's giving or promising to give anything of value to voter in exchange for vote or support could not be applied to nullify election of candidate. U.S.C.A.Const. Amends. 1, 14; KRS 121.055.

[6] Constitutional Law ⇐90.1(1.2)
92k90.1(1.2) Most Cited Cases
(Formerly 92k90.1(1))
A state may insist that candidates seeking approval of electorate work within framework of democratic institutions, and base appeal on assertions of fitness for office and statements respecting means by which they intend to further public welfare, but a candidate's promise to confer some ultimate benefit on voters, qua taxpayer, citizen, or member of general public, does not lay beyond pale of First Amendment protection. U.S.C.A.Const.Amend. 1.

[7] Constitutional Law ⇐90.1(1.2)
92k90.1(1.2) Most Cited Cases
(Formerly 92k90.1(1))
[7] Elections ⇐311
144k311 Most Cited Cases
Kentucky's ban on public statements with respect to willingness of candidates to serve in public office without remuneration ran directly contrary to fundamental premises underlying the First Amendment and state's fear that voters might make ill-advised choice based on public statements with respect to this issue did not provide state with compelling justification for limiting speech; rather, Kentucky could address its concern by prohibiting reduction of public officials' salary during term of office, as it had done. KRS 64.530(4), 121.055; Ky.Const. §§ 161, 246; U.S.C.A.Const.Amend. 1.

[8] Constitutional Law ⇐90.1(1.2)
92k90.1(1.2) Most Cited Cases
(Formerly 92k90.1(1))
Where there was no showing that county commissioner candidate made disputed statement that, if elected, he would reduce salaries other than in good faith and without knowledge of its falsity, or that he made statement with reckless disregard of whether it was false or not, and where he retracted statement promptly after discovering that it might have been false, nullifying his election victory on basis of Kentucky Corrupt Practices Act was inconsistent with the First Amendment. U.S.C.A.Const.Amends. 1, 14; KRS 121.055.

***1524 *45 *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Petitioner, the challenger, in a general election, for respondent's office as a Commissioner of Jefferson County, Ky., committed himself, at a televised press conference, to lowering Commissioners' salaries if elected. Upon learning that such commitment arguably violated a provision of the Kentucky Corrupt Practices Act (§ 121.055), petitioner retracted his pledge. On its face, § 121.055 prohibits a candidate from offering material benefits to voters in consideration for their votes. After petitioner **1525 won the election, respondent filed suit in a Kentucky state court, alleging that petitioner had violated § 121.055 and seeking to have the election declared void. Although finding that, under the reasoning of an earlier decision of the Kentucky Court of Appeals construing § 121.055, petitioner had violated the statute by promising to reduce his salary to less than that "fixed by law," the trial court concluded that petitioner had been "fairly elected" and refused to order a new election. The Kentucky Court of Appeals reversed.

Held: Section 121.055 was applied in this case to limit speech in violation of the First Amendment. Pp. 1528-1533.

(a) Although the States have a legitimate interest in preserving the integrity of their electoral processes, when a State seeks to restrict directly a candidate's offer of ideas to the voters, the First Amendment requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression. Pp. 1528-1529.

(b) The application of § 121.055 in this case cannot be justified as a prohibition on buying votes. Petitioner's statements, which were made openly and were subject to the criticism of his political opponent and to the scrutiny of the voters, were very different in character from corrupting private agreements and solicitations historically recognized as unprotected by the First Amendment. There is no constitutional basis upon which his pledge to reduce his salary may be equated with a candidate's promise to pay voters privately for their support from his own pocketbook. A candidate's promise to confer some ultimate benefit on the voter, *qua* taxpayer, citizen, or member of the general public, does not lie beyond the pale of First Amendment protection. Pp. 1529-1531.

***46** (c) If § 121.055 was designed to further the State's interest in ensuring that the willingness of some persons to serve in public office without remuneration does not make gratuitous service the *sine qua non* of plausible candidacy--resulting in persons of independent wealth but less ability being chosen over those who, though better qualified, cannot afford to serve at a reduced salary--it chose a means unacceptable under the First Amendment. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is not the government's function to select which issues are worth discussing in the course of a political campaign. P. 1532.

(d) Nor can application of § 121.055 here be justified on the basis of the State's interests and prerogatives with respect to factual misstatements, on the asserted ground that the statute bars promises to serve at a reduced salary only when the salary of the official has been "fixed by law" and the promise cannot, therefore, be delivered. Erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the "breathing space" that they need to survive. Nullifying petitioner's election victory would be inconsistent with the atmosphere of robust political debate required by the First Amendment. There was no showing that he made the disputed statement other than in good faith and without knowledge of its falsity, or with reckless disregard of whether it was false or not. Moreover, he retracted the statement promptly after determining that it might have been false. Pp. 1532-1533.

Ky.App., 618 S.W.2d 603, reversed and remanded.

Fred M. Goldberg, Louisville, Ky., for petitioner L. Stanley Chauvin, Jr., Louisville, Ky., as *amicus curiae* in support of the judgment below.

Justice BRENNAN delivered the opinion of the Court.

The question presented is whether the First Amendment, as applied to the States through the Fourteenth Amendment, ***47** prohibits a State from declaring an election ****1526** void because the victorious candidate had announced to the voters during his campaign that he intended to serve at a salary less than that "fixed by law."

I

This case involves a challenge to an application of the Kentucky Corrupt Practices Act. The parties were opposing candidates in the 1979 general election for the office of Jefferson County Commissioner, "C" District. Petitioner, Carl Brown, was the challenger; respondent, Earl Hartlage, was the incumbent. [FN1] On August 15, 1979, in the course of the campaign, Brown held a televised press conference together with Bill Creech, the "B" District candidate on the same party ticket. Brown charged his opponent with complicity in a form of fiscal abuse:

> FN1. Although respondent filed a brief in opposition to the petition for writ of certiorari, he did not file a brief on the merits. At the invitation of the Court, L. Stanley Chauvin, Jr., Esq., submitted a brief and argued in support of the judgment below as *amicus curiae*.

"There are ... three part-time county commissioners. With state law limiting their authority and responsibility to legislation ..., it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that the part-time commissioners nevertheless see fit to pay themselves the same amount as that paid the full-time county judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify those payments.... At a fiscal court meeting in 1976, Hartlage led a surprise move to ... more than double the salaries of the county commissioners! His actions demonstrated his unmistakable disrespect for the office of the chief executive of this county and his utter disdain for the spirit of laws that govern our county system.... [U]sing the gray fringes of the law for his ***48** own personal gain, Hartlage led the move to funnel county tax dollars into commissioners' pockets." App. 1-2.

On behalf of himself and his running mate, Creech pledged the taxpayers some relief:

"We abhor the commissioners' outrageous salaries. And to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each year." *Id.*, at 2. [FN2]

FN2. Brown echoed his running mate's call for fiscal restraint:

"... These two proposals--cutting our own salaries and reorganizing the commissioner's office staff, will save the taxpayers over $172,000 during our term of office.

"We make these statements fully aware that the office we intend to occupy should set the tone for the type of public officials we intend to be.

"Under our guidance, extravagance of public expense will be a thing of the past, and responsibility and integrity will be our watchwords, Progress through Cooperation our theme." App. 3.

Shortly after the press conference, Brown and Creech learned that their commitment to lower their salaries arguably violated the Kentucky Corrupt Practices Act. On August 19, 1979, they issued a joint statement retracting their earlier pledge:

"We are men enough to admit when we've made a mistake.

"We have discovered that there are Kentucky court decisions and Attorney General opinions which indicate that our pledge to reduce our salaries if elected may be illegal.

* * *

".... [W]e do hereby formally rescind our pledge to reduce the County Commissioners' salary if elected and instead ***49** pledge to seek corrective legislation in the next session of the General Assembly, to correct this silly provision of State Law." *Id.*, at 4-5.

In the November 6, 1979, election, Brown defeated Hartlage by 10,151 votes. [FN3] Creech was defeated.

FN3. Hartlage received a total of 83,675 votes; Brown received 93,826 votes. Certificate of Election, *id.*, at 7.

Hartlage then filed this action in the Jefferson Circuit Court, alleging that ****1527** Brown had violated the Corrupt Practices Act and seeking to have the election declared void and the office of Jefferson County Commissioner, "C" District, vacated by Brown. Section 121.055, upon which Hartlage based his claim, provides:

"Candidates prohibited from making expenditure, loan, promise, agreement, or contract as to action when elected, in consideration for vote.--No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract." Ky.Rev.Stat. § 121.055 (1982). [FN4]

FN4. In 1980, the provision was amended to replace the word "demand" in the last clause with the word "require." 1980 Ky.Acts, ch. 292, § 3.
Under Kentucky law, an equity action to contest an election may be maintained by any candidate who received more than 25% of the number of votes that were cast for the successful candidate. Ky.Rev.Stat. §§ 120.155, 120.165 (1982). The Kentucky Corrupt Practices Act identifies a violation of § 121.055 as a proper basis for such a contest, and provides that "[i]f no such violation [of the Corrupt Practices Act] by the contestant or by others in his behalf with his knowledge, appears, and it appears that such provisions have been violated by the contestee, or by others in his behalf with his knowledge, the nomination or election of the contestee shall be declared void." Ky.Rev.Stat. § 120.015 (1982).

***50** In *Sparks v. Boggs*, 339 S.W.2d 480 (1960), the Kentucky Court of Appeals held that candidates' promises to serve at yearly salaries of $1, and to vote to distribute the salary savings to specified charitable organizations, violated the Corrupt Practices Act where the salaries had been "fixed by law." In the instant case, the trial court found that Brown's prospective salary had been fixed by law and that, under the reasoning of *Sparks*, Brown's promise violated the Act. Nevertheless, the court concluded that in light of Brown's retraction, the defeat of his running mate, who had joined in the pledge, and the presumption that the will of the people had been revealed through the election process, Brown had been "fairly elected." App. 25. It thus declined to order a new election. *Id.*, at 26.

The Kentucky Court of Appeals reversed. 618 S.W.2d 603. That court agreed with the Circuit Court that the salary of County Commissioners was fixed by law, [FN5] and that Brown's statement was proscribed by § 121.055 as construed in *Sparks v. Boggs, supra.* [FN6] The Court of Appeals also held, however, that the trial ****1528** court had erred in failing to order a new election. App. 34-35. It held that retraction of the offendingstatement ***51** was "of no consequence under the law of this state," *id.*, at 35, and that the trial court was mistaken in believing that it possessed the discretionary authority to balance the gravity of the violation against the disenfranchisement of the electorate that would result from declaring the election void, *ibid.* With respect to Brown's First Amendment claims, the court was of the view that "[t]o hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression." *Id.*, at 36. The court quoted approvingly the maxims that "[a] state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace," and that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Id.*, at 36-37, quoting 16A Am.Jur.2d, Constitutional Law §§ 409, 507 (1979). The court then concluded that Brown's "statement was not constitutionally protected." App. 37.

FN5. The Court of Appeals noted that under Kentucky law, "salaries for county officers elected by popular vote shall be set by the fiscal court 'not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term....' Brown promised to do an act that he could not legally do." App. 32-33 (quoting Ky.Rev.Stat. § 64.530(4) (1980)). See Ky.Const. §§ 161, 246.

FN6. The court quoted the following extract from *Sparks*, describing the rationale underlying the statute's application to statements such as Brown's:
" ' "An agreement by a candidate for office that if chosen he will discharge the duties of the office without compensation or for a lesser compensation than that provided by law, or will pay part of his salary into the public treasury, is illegal, whether made in good faith or not. The underlying

> principle ... is that when a candidate offers to discharge the duties of an elective office for less than the salary fixed by law, a salary which must be paid by taxation, he offers to reduce pro tanto the amount of taxes each individual taxpayer must pay, and thus makes an offer to the voter of pecuniary gain." [quoting 43 Am.Jur., Public Officers § 374, p. 159 (1942)]. " 'It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act.' " App. 33.

In an opinion denying petitioner's motion for rehearing, the court more pointedly addressed petitioner's First Amendment arguments. The court found that the State's interest in the fairness and integrity of its elections was compelling, ***52** and that the State could insist that elections be conducted free of corruption and bribery. *Id.*, at 39. The court restated its view that under the laws of the State a promise such as Brown's was considered an attempt to buy votes or to bribe the voters. *Ibid.* Finally, the court rejected petitioner's argument that § 121.055, as construed by *Sparks, supra*, was "unconstitutionally broad." Although the court found some appeal in Brown's argument that "[i]f carried to its logical extreme ... any promise by a candidate to increase the efficiency and thus lower the cost of government might likewise be considered as an attempt to buy votes," the court was of the view that *Sparks* controlled its disposition and suggested to petitioner that he seek reconsideration of that decision in the Supreme Court of Kentucky. App. 39-40. The Supreme Court of Kentucky denied review. *Id.*, at 41. We granted the petition for certiorari. 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981).

II

[1] We begin our analysis of § 121.055 by acknowledging that the States have a legitimate interest in preserving the integrity of their electoral processes. Just as a State may take steps to ensure that its governing political institutions and officials properly discharge public responsibilities and maintain public trust and confidence, a State has a legitimate interest in upholding the integrity of the electoral process itself. But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated.

At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed. As we noted in *Mills v. Alabama*, 384 U.S. 214, 218-219, 86 S.Ct. 1434, 1436-1437, 16 L.Ed.2d 484 (1966):

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. ***53** This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."

The free exchange of ideas provides special vitality to the process traditionally at ****1529** the heart of American constitutional democracy--the political campaign. "[I]f it be conceded that the First Amendment was 'fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971) (citation omitted). The political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite to the contrary:

> "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their

positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country 'public discussion is a political duty,' *Whitney v. California*, 274 U.S. 357, 375 [47 S.Ct. 641, 648, 71 L.Ed. 1095] (1927) (concurring opinion), applies with special force to candidates for public office." *Buckley v. Valeo*, 424 U.S. 1, 52-53 [96 S.Ct. 612, 651, 46 L.Ed.2d 659] (1976) (*per curiam*).

[2] When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not ***54** only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.

III

On its face, § 121.055 prohibits a candidate from offering material benefits to voters in consideration for their votes, and, conversely, prohibits candidates from accepting payments in consideration for the manner in which they serve their public function. *Sparks v. Boggs*, 339 S.W.2d 480 (1960), placed a not entirely obvious gloss on that provision with respect to candidate utterances concerning the salaries of the office for which they were running, by barring the candidate from promising to reduce his salary when that salary was already "fixed by law." We thus consider the constitutionality of § 121.055 with respect to the proscription evident on the face of the statute, and in light of the more particularized concerns suggested by the *Sparks* gloss. We discern three bases upon which the application of the statute to Brown's promise might conceivably be justified: first, as a prohibition on buying votes; second, as facilitating the candidacy of persons lacking independent wealth; and third, as an application of the State's interests and prerogatives with respect to factual misstatements. We consider these possible justifications in turn.

A

[3] The first sentence of § 121.055 prohibits a political candidate from giving, or promising to give, anything of value to a voter in exchange for his vote or support. In many of its possible applications, this provision would appear to present little constitutional difficulty, for a State may surely prohibit a candidate from buying votes. No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter. And as a State may prohibit the giving of money or other things of value to a voter in exchange for his support, it may also declare unlawful an agreement ***55** embodying the intention to make such an exchange. Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying ****1530** conduct, the constitutional immunities that the First Amendment extends to speech. Finally, while a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496, 102 S.Ct. 1186, 1192, 71 L.Ed.2d 362 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563-564, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973).

[4] It is thus plain that *some* kinds of promises made by a candidate to voters, and *some* kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty. But it is equally plain that there are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed "indispensable to decisionmaking in a democracy," *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S.Ct. 1407, 1416, 55 L.Ed.2d 707 (1978); and the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system."

Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect ***56** of their vote. The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare. [FN7] So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot.

> FN7. See The Federalist No. 10. The Madisonian democratic tradition extolled a system of political pluralism in which "the private interest of every individual may be a sentinel over the public rights." The Federalist No. 51, p. 324 (H. Lodge ed. 1888). But it was also contemplated within that tradition that the individual may perceive his interest as according with the public good: "In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good." *Id.*, at 327.

It remains to determine the standards by which we might distinguish between those "private arrangements" that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system. We hesitate before attempting to formulate some test of constitutional legitimacy: the precise nature of the promise, the conditions upon which it is given, the circumstances under which it is made, the size of the audience, the nature and size of the group to be benefited, all might, in some instance and to varying extents, bear upon the constitutional assessment. But acknowledging the difficulty of rendering a concise formulation, or recognizing the possibility of borderline cases, does not disable us from identifying cases far from any troublesome border.

It is clear that the statements of petitioner Brown in the course of the August 15 ****1531** press conference were very different ***57** in character from the corrupting agreements and solicitations historically recognized as unprotected by the First Amendment. Notably, Brown's commitment to serve at a reduced salary was made openly, subject to the comment and criticism of his political opponent and to the scrutiny of the voters. We think the fact that the statement was made in full view of the electorate offers a strong indication that the statement contained nothing fundamentally at odds with our shared political ethic.

[5] The Kentucky Court of Appeals analogized Brown's promise to a bribe. But however persuasive that analogy might be as a matter of state law, there is no *constitutional* basis upon which Brown's pledge to reduce his salary might be equated with a candidate's promise to pay voters for their support from his own pocketbook. Although upon election Brown would undoubtedly have had a valid claim to the salary that had been "fixed by law," Brown did not offer the voters a payment from his personal funds. His was a declaration of intention to exercise the fiscal powers of government office within what he believed (albeit erroneously) to be the recognized framework of office. At least to outward appearances, the commitment was fully in accord with our basic understanding of legitimate activity by a government body. Before any implicit monetary benefit to the individual taxpayer might have been realized, public officials--among them, of course, Brown himself--would have had to approve that benefit in accordance with the good faith exercise of their public duties. Although Brown may have been incorrect in suggesting that his salary could have been lawfully reduced, this cannot, in itself, transform his promise into an invitation to engage in a private and politically corrupting arrangement.

In addition, despite the Kentucky courts' characterization of the promise to serve at a reduced salary as an offer "to reduce pro tanto the amount of

taxes each individual taxpayer must pay, and thus ... an offer to the voter of pecuniary gain," App. 33, it is impossible to discern in Brown's generalized ***58** commitment any invitation to enter into an agreement that might place the statement outside the realm of unequivocal protection that the Constitution affords to political speech. Not only was the source of the promised benefit the public fisc, but that benefit was to extend beyond those voters who cast their ballots for Brown, to all taxpayers and citizens. Even if Brown's commitment could in some sense have been deemed an "offer," it scarcely contemplated a particularized acceptance or a *quid pro quo* arrangement. It was to be honored, "if elected"; it was conditioned not on any particular vote or votes, but entirely on the *majority's* vote.

In sum, Brown did not offer some private payment or donation in exchange for voter support; Brown's statement can only be construed as an expression of his intention to exercise public power in a manner that he believed might be acceptable to some class of citizens. If Brown's expressed intention had an individualized appeal to some taxpayers who felt themselves the likely beneficiaries of his form of fiscal restraint, that fact is of little constitutional significance. The benefits of most public policy changes accrue not only to the undifferentiated "public," but more directly to particular individuals or groups. Like a promise to lower taxes, to increase efficiency in government, or indeed to increase taxes in order to provide some group with a desired public benefit or public service, Brown's promise to reduce his salary cannot be deemed beyond the reach of the First Amendment, or considered as inviting the kind of corrupt arrangement the appearance of which a State may have a compelling interest in avoiding. See *Buckley v. Valeo*, 424 U.S., at 27, 96 S.Ct., at 638.

[6] A State may insist that candidates seeking the approval of the electorate work within the framework of our democratic institutions, and base their appeal on assertions of fitness for office and statements respecting the means by which they intend to further the public welfare. But a candidate's promise to confer some ultimate benefit on the voter, *qua* taxpayer,***59** citizen, or ****1532** member of the general public, does not lie beyond the pale of First Amendment protection.

B

[7] *Sparks v. Boggs*, 339 S.W.2d 480 (1960), relied in part on the interest a State may have in ensuring that the willingness of some persons to serve in public office without remuneration does not make gratuitous service the *sine qua non* of plausible candidacy. [FN8] The State might legitimately fear that such emphasis on free public service might result in persons of independent wealth but less ability being chosen over those who, though better qualified, could not afford to serve ***60** at a reduced salary. But if § 121.055 was designed to further this interest, it chooses a means unacceptable under the First Amendment. [FN9] In barring certain public statements with respect to this issue, the State ban runs directly contrary to the fundamental premises underlying the First Amendment as the guardian of our democracy. That Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is simply not the function of government to "select which issues are worth discussing or debating," *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972), in the course of a political campaign.

> FN8. As explained by the Kentucky Court of Appeals:
> "To hold otherwise would permit the various elective public offices to become filled by those who would purchase their election thereto by making the most extravagant bid. The auction method of choosing a public officer would supplant the personal fitness test. Eventually most of the public offices would be occupied by the opulent, who could afford to serve without pay, or by the ambitious, who would serve only for the pittance of honor attached to the office, or by the designing grafter, who would surely obtain his remuneration by methods which would not bear scrutiny. Under such a system good government would certainly vanish from every subdivision of the state." 339

S.W.2d, at 484.
Other courts have expressed similar views.
For example, *Sparks* quoted with approval the following passage from the opinion of Justice Brewer of the Supreme Court of Kansas, later Justice Brewer of this Court, in *State ex rel. Bill v. Elting*, 29 Kan. 397, 402 (1883):
" 'The theory of popular government is that the most worthy should hold the offices. Personal fitness--and in that is included moral character, intellectual ability, social standing, habits of life, and political convictions--is the single test which the law will recognize. That which throws other considerations into the scale, and to that extent tends to weaken the power to personal fitness, should not be tolerated. It tends to turn away the thought of the voter from the one question which should be paramount in his mind when he deposits his ballot. It is in spirit at least, bribery, more insidious, and therefore more dangerous, than the grosser form of directly offering money to the voter.' " 339 S.W.2d, at 483-484.
See also *State ex rel. Clements v. Humphreys*, 74 Tex. 466, 12 S.W. 99 (1889).

FN9. A State could address this concern by prohibiting the reduction of a public official's salary during his term of office, as Kentucky has done here. See n. 5, *supra*. Such a prohibition does not offend the First Amendment. We note, only in passing, that along with the 10 proposed Articles that upon ratification became the first 10 Amendments to the Constitution, were 2 others, proposed Articles I and II, which were not ratified. Article II provided: "No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened."

C

[8] *Amicus* points out that § 121.055, as applied through *Sparks v. Boggs*, *supra*, bars promises to serve at a reduced salary only when the salary of the official has been "fixed by law," and where the promise cannot, therefore, be delivered. Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974). But "erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive,' " ***61***New York Times Co. v. Sullivan*, 376 U.S. 254, 271-272, ****153384** S.Ct. 710, 721, 11 L.Ed.2d 686 (1964), quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). Section 121.055, as applied in this case, has not afforded the requisite "breathing space."

The Commonwealth of Kentucky has provided that a candidate for public office forfeits his electoral victory if he errs in announcing that he will, if elected, serve at a reduced salary. As the Kentucky courts have made clear in this case, a candidate's liability under § 121.055 for such an error is absolute: His election victory must be voided even if the offending statement was made in good faith and was quickly repudiated. The chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns. See *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57 (1971). Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount. Whenever compatible with the underlying interests at stake, under the regime of that Amendment "we depend for ... correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 339-340, 94 S.Ct. at 3006-3007. In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent. The preferred First Amendment remedy of "more speech, not enforced

silence," *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring), thus has special force. Cf. *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 344, 94 S.Ct. at 3009. There has been no showing in this case that petitioner made the disputed statement other than in good faith and without knowledge of its falsity, or that he made the statement with reckless disregard as to whether it was false or not. Moreover, petitioner retracted ***62** the statement promptly after discovering that it might have been false. Under these circumstances, nullifying petitioner's election victory was inconsistent with the atmosphere of robust political debate protected by the First Amendment.

IV

Because we conclude that § 121.055 has been applied in this case to limit speech in violation of the First Amendment, we reverse the judgment of the Kentucky Court of Appeals and remand for proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE concurs in the judgment.

Justice REHNQUIST, concurring in the result.

I agree that the provision of the Kentucky Corrupt Practices Act discussed by the Court in its opinion impermissibly limits freedom of speech on the part of political candidates in violation of the First and Fourteenth Amendments to the United States Constitution. Because on different facts I think I would give more weight to the State's interest in preventing corruption in elections, I am unable to join the Court's analogy between such laws and state defamation laws. I think *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966) , affords ample basis for reaching the result at which the Court arrives, and I see no need to rely on other precedents which do not involve state efforts to regulate the electoral process.

456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732

Briefs and Other Related Documents (Back to top)

• 1982 WL 608607 (Appellate Brief) Reply Brief for Petitioner, Carl W. Brown (Jan. 18, 1982)

• 1981 WL 389784 (Appellate Brief) Petitioner's Brief on the Merits (May. 18, 1981)

• 1980 WL 339528 (Appellate Brief) Amicus Curiae's Brief on the Merits (Dec. 18, 1980)

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121 S.Ct. 525 Page 1
531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388, 69 USLW 4029, 00 Cal. Daily Op. Serv. 9879, 2000 Daily Journal D.A.R. 13,163, 14 Fla. L. Weekly Fed. S 26
(Cite as: 531 U.S. 98, 121 S.Ct. 525)

Briefs and Other Related Documents

Supreme Court of the United States

George W. BUSH, et al., Petitioners,
v.
Albert GORE, Jr., et al.

No. 00-949.

Dec. 12, 2000.

Democratic candidates for President and Vice President of the United States filed complaint contesting certification of state results in presidential election. The Circuit Court, Leon County, N. Sanders Sauls, J., entered judgment denying all relief, and candidates appealed. The District Court of Appeal certified the matter to the Florida Supreme Court. On review, the Florida Supreme Court, 772 So.2d 1243, ordered manual recounts of ballots on which machines had failed to detect vote for President. Republican candidates filed emergency application for stay of Florida Supreme Court's mandate. The United States Supreme Court, 531 U.S. 1046, 121 S.Ct. 512, 148 L.Ed.2d 553, granted application, treating it as petition for writ of certiorari, and granted certiorari. The Supreme Court held that: (1) manual recounts ordered by Florida Supreme Court, without specific standards to implement its order to discern "intent of the voter," did not satisfy minimum requirement for non-arbitrary treatment of voters necessary, under Equal Protection Clause, to secure fundamental right to vote for President, and (2) remand of case to Florida Supreme Court for it to order constitutionally proper contest would not be appropriate remedy.

Reversed and remanded.

Chief Justice Rehnquist filed concurring opinion in which Justices Scalia and Thomas joined.

Justice Stevens filed dissenting opinion in which Justices Ginsburg and Breyer joined.

Justice Souter filed dissenting opinion in which Justice Breyer joined and Justices Stevens and Ginsburg joined in part.

Justice Ginsburg filed dissenting opinion in which Justice Stevens joined and Justices Souter and Breyer joined in part.

Justice Breyer filed dissenting opinion in which Justices Stevens and Ginsburg joined in part, and in which Justice Souter also joined in part.

West Headnotes

[1] United States ⇐25
393k25 Most Cited Cases
The individual citizen has no federal constitutional right to vote for electors for President of the United States unless and until state legislature chooses statewide election as means to implement its power to appoint members of Electoral College. U.S.C.A. Const. Art. 2, § 1, cl. 2.

[2] Elections ⇐10
144k10 Most Cited Cases
When state legislature vests right to vote for President in its people, the right to vote as legislature has prescribed is fundamental, and one source of its fundamental nature lies in the equal weight accorded to each vote and equal dignity owed to each voter. U.S.C.A. Const. Art. 2, § 1; Art. 2, cl. 2.

[3] United States ⇐25
393k25 Most Cited Cases
The State, after granting individual citizens the right to vote for electors for the President of the United States, can take back the power to appoint electors. U.S.C.A. Const. Art. 2, § 1, cl. 2.

[4] Constitutional Law ⇐225.2(1)
92k225.2(1) Most Cited Cases

[4] Elections ⇐1
144k1 Most Cited Cases

The right to vote is protected in more than the initial allocation of the franchise; equal protection applies as well to the manner of its exercise. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law ⇐225.3(1)
92k225.3(1) Most Cited Cases
Having once granted the right to vote on equal terms, the State may not, under Equal Protection Clause, value one person's vote over that of another by later arbitrary and disparate treatment. U.S.C.A. Const.Amend. 14.

[6] Elections ⇐1
144k1 Most Cited Cases
Right of suffrage can be denied by debasement or dilution of weight of citizen's vote just as effectively as by wholly prohibiting free exercise of the franchise.

[7] Constitutional Law ⇐225.2(6)
92k225.2(6) Most Cited Cases
[7] Elections ⇐299(.5)
144k299(.5) Most Cited Cases
Manual recounts of ballots on which machines had failed to detect vote for President, as implemented in response to Florida Supreme Court's opinion which ordered that "intent of the voter" be discerned but did not supply specific standards to ensure uniform treatment, did not satisfy minimum requirement for non-arbitrary treatment of voters necessary, under Equal Protection Clause, to secure the fundamental right to vote for President. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law ⇐225.2(6)
92k225.2(6) Most Cited Cases
When state court orders statewide recount in Presidential election, equal protection requires that there be at least some assurance that rudimentary requirements of equal treatment and fundamental fairness are satisfied. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law ⇐225.2(6)
92k225.2(6) Most Cited Cases
[9] Constitutional Law ⇐274.2(1)
92k274.2(1) Most Cited Cases
[9] Elections ⇐299(.5)
144k299(.5) Most Cited Cases
[9] Elections ⇐299(4)
144k299(4) Most Cited Cases
For state recount in presidential election to be conducted in compliance with requirements of equal protection and due process, it would require adoption of adequate statewide standards for determining what was a legal vote, and practicable procedures to implement them, and also orderly judicial review of any disputed matters that might arise. U.S.C.A. Const.Amend. 14.

[10] Elections ⇐299(.5)
144k299(.5) Most Cited Cases
[10] Federal Courts ⇐513
170Bk513 Most Cited Cases
Following reversal of Florida Supreme Court's order requiring manual recounts in presidential election, United States Supreme Court could not remand case to Florida Supreme Court for it to order constitutionally proper contest, where safe-harbor date, six days before presidential electors would meet to vote, had passed; since Florida Supreme Court had said that Florida Legislature intended to obtain benefits of safe-harbor, that proposed remedy contemplated action in violation of Florida election code, and hence could not be part of "appropriate" order authorized by Florida's contest statute. 3 U.S.C.A. § 5; West's F.S.A. § 102.168(8).

****527 *100** PER CURIAM.

I

On December 8, 2000, the Supreme Court of Florida ordered that the Circuit Court of Leon County tabulate by hand 9,000 ballots in Miami-Dade County. It also ordered the inclusion in the certified vote totals of 215 votes identified in Palm Beach County and 168 votes identified in Miami-Dade County for Vice President Albert Gore, Jr., and Senator Joseph Lieberman, Democratic candidates for President and Vice President. The State Supreme Court noted that petitioner George W. Bush asserted that the net gain for Vice President Gore in Palm Beach County was 176 votes, and directed the Circuit Court to resolve that dispute on remand. *Gore v. Harris,* 772 So.2d 1243, 1248, n. 6. The court further held that relief would require manual recounts in all Florida counties where so-called "undervotes" had not been subject to manual tabulation. The court ordered all manual recounts to begin at once. Governor Bush and Richard Cheney, Republican candidates for President and Vice President, filed an emergency application for a stay of this mandate. On December 9, we granted the application, treated the

application as a petition for a writ of certiorari, and granted certiorari. *Post,* 531 U.S. 1046, 121 S.Ct. 512, 148 L.Ed.2d 553.

The proceedings leading to the present controversy are discussed in some detail in our opinion in *Bush v. Palm Beach County Canvassing Bd., ante,* 531 U.S. 70, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000) *(per curiam) (Bush I).* On November 8, 2000, the day following the Presidential election, the Florida Division of Elections reported that petitioner Bush had received 2,909,135 votes, and respondent Gore had received 2,907,351 votes, a margin of ***101** 1,784 for ****528** Governor Bush. Because Governor Bush's margin of victory was less than "one-half of a percent ... of the votes cast," an automatic machine recount was conducted under § 102.141(4) of the election code, the results of which showed Governor Bush still winning the race but by a diminished margin. Vice President Gore then sought manual recounts in Volusia, Palm Beach, Broward, and Miami-Dade Counties, pursuant to Florida's election protest provisions. Fla. Stat. Ann. § 102.166 (Supp.2001). A dispute arose concerning the deadline for local county canvassing boards to submit their returns to the Secretary of State (Secretary). The Secretary declined to waive the November 14 deadline imposed by statute. §§ 102.111, 102.112. The Florida Supreme Court, however, set the deadline at November 26. We granted certiorari and vacated the Florida Supreme Court's decision, finding considerable uncertainty as to the grounds on which it was based. *Bush I,* 531 U.S., at 78, 121 S.Ct. 471. On December 11, the Florida Supreme Court issued a decision on remand reinstating that date. *Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1273, 1290.

On November 26, the Florida Elections Canvassing Commission certified the results of the election and declared Governor Bush the winner of Florida's 25 electoral votes. On November 27, Vice President Gore, pursuant to Florida's contest provisions, filed a complaint in Leon County Circuit Court contesting the certification. Fla. Stat. Ann. § 102.168 (Supp.2001). He sought relief pursuant to § 102.168(3)(c), which provides that "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election" shall be grounds for a contest. The Circuit Court denied relief, stating that Vice President Gore failed to meet his burden of proof. He appealed to the First District Court of Appeal, which certified the matter to the Florida Supreme Court.

Accepting jurisdiction, the Florida Supreme Court affirmed in part and reversed in part. ***102***Gore v. Harris,* 772 So.2d 1243 (2000). The court held that the Circuit Court had been correct to reject Vice President Gore's challenge to the results certified in Nassau County and his challenge to the Palm Beach County Canvassing Board's determination that 3,300 ballots cast in that county were not, in the statutory phrase, "legal votes."

The Supreme Court held that Vice President Gore had satisfied his burden of proof under § 102.168(3)(c) with respect to his challenge to Miami-Dade County's failure to tabulate, by manual count, 9,000 ballots on which the machines had failed to detect a vote for President ("undervotes"). *Id.,* at 1256. Noting the closeness of the election, the court explained that "[o]n this record, there can be no question that there are legal votes within the 9,000 uncounted votes sufficient to place the results of this election in doubt." *Id.,* at 1261. A "legal vote," as determined by the Supreme Court, is "one in which there is a 'clear indication of the intent of the voter.' " *Id.,* at 1257. The court therefore ordered a hand recount of the 9,000 ballots in Miami-Dade County. Observing that the contest provisions vest broad discretion in the circuit judge to "provide any relief appropriate under such circumstances," § 102.168(8), the Supreme Court further held that the Circuit Court could order "the Supervisor of Elections and the Canvassing Boards, as well as the necessary public officials, in all counties that have not conducted a manual recount or tabulation of the undervotes ... to do so forthwith, said tabulation to take place in the individual counties where the ballots are located." *Id.,* at 1262.

The Supreme Court also determined that both Palm Beach County and Miami-Dade County, in their earlier manual recounts, ****529** had identified a net gain of 215 and 168 legal votes for Vice President Gore. *Id.,* at 1260. Rejecting the Circuit Court's conclusion that Palm Beach County lacked the authority to include the 215 net votes submitted

***103** past the November 26 deadline, the Supreme Court explained that the deadline was not intended to exclude votes identified after that date through ongoing manual recounts. As to Miami-Dade County, the court concluded that although the 168 votes identified were the result of a partial recount, they were "legal votes [that] could change the outcome of the election." *Ibid.* The Supreme Court therefore directed the Circuit Court to include those totals in the certified results, subject to resolution of the actual vote total from the Miami-Dade partial recount.

The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.

II

A

The closeness of this election, and the multitude of legal challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot. See Ho, More Than 2M Ballots Uncounted, AP Online (Nov. 28, 2000); Kelley, Balloting Problems Not Rare But Only in a Very Close Election Do Mistakes and Mismarking Make a Difference, Omaha World-Herald (Nov. 15, 2000). In certifying election results, the votes eligible for inclusion in the certification are the votes meeting the properly established legal requirements.

***104** This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.

B

[1][2][3] The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college. U.S. Const., Art. II, § 1. This is the source for the statement in *McPherson v. Blacker,* 146 U.S. 1, 35, 13 S.Ct. 3, 36 L.Ed. 869 (1892), that the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself, which indeed was the manner used by state legislatures in several States for many years after the framing of our Constitution. *Id.,* at 28-33, 13 S.Ct. 3. History has now favored the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. The State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors. See *id.,* at 35, 13 S.Ct. 3 (" '[T]here is no doubt of the right of the legislature to resume the power ****530** at any time, for it can neither be taken away nor abdicated' ") (quoting S.Rep. No. 395, 43d Cong., 1st Sess., 9 (1874)).

[4][5][6] The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that ***105** of another. See, *e.g., Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by

wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

There is no difference between the two sides of the present controversy on these basic propositions. Respondents say that the very purpose of vindicating the right to vote justifies the recount procedures now at issue. The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to register the perforations. In some cases a piece of the card--a chad--is hanging, say, by two corners. In other cases there is no separation at all, just an indentation.

[7] The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. For purposes of resolving the equal protection challenge, it is not necessary to decide whether the Florida Supreme Court had the authority under the legislative scheme for resolving election disputes to define what a legal vote is and to mandate a manual recount implementing that definition. The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right. Florida's basic command for the count of legally cast votes is to consider the "intent of ***106** the voter." 772 So.2d, at 1262. This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.

The law does not refrain from searching for the intent of the actor in a multitude of circumstances; and in some cases the general command to ascertain intent is not susceptible to much further refinement. In this instance, however, the question is not whether to believe a witness but how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper which, it is said, might not have registered as a vote during the machine count. The factfinder confronts a thing, not a person. The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. See *id.,* at 1267 (Wells, C.J., dissenting) ("Should a county canvassing board count or not count a 'dimpled chad' where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree"). As seems to have been acknowledged at oral argument, the standards for accepting or rejecting contested ****531** ballots might vary not only from county to county but indeed within a single county from one recount team to another.

The record provides some examples. A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. 3 Tr. 497, 499 (Dec. 3, 2000). And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considereda ***107** vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.

An early case in our one-person, one-vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders,* 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963). The Court found a constitutional violation. We relied on these principles in the context of the Presidential selection process in *Moore v. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), where we

invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.*, at 819, 89 S.Ct. 1493.

The State Supreme Court ratified this uneven treatment. It mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified total. The court also appeared to hold *sub silentio* that the recount totals from Broward County, which were not completed until after the original November 14 certification by the Secretary, were to be considered part of the new certified vote totals even though the county certification was not contested by Vice President Gore. Yet each of the counties used varying standards to determine what was a legal vote. Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.

In addition, the recounts in these three counties were not limited to so-called undervotes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, ***108** the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernible by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernible by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

That brings the analysis to yet a further equal protection problem. The votes certified by the court included a partial total from one county, Miami-Dade. The Florida ****532** Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete. Indeed, it is respondents' submission that it would be consistent with the rules of the recount procedures to include whatever partial counts are done by the time of final certification, and we interpret the Florida Supreme Court's decision to permit this. See 772 So.2d, at 1261-1262, n. 21 (noting "practical difficulties" may control outcome of election, but certifying partial Miami-Dade total nonetheless). This accommodation no doubt results from the truncated contest period established by the Florida Supreme Court in *Palm Beach County Canvassing Bd. v. Harris*, at respondents' own urging. The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees.

***109** In addition to these difficulties the actual process by which the votes were to be counted under the Florida Supreme Court's decision raises further concerns. That order did not specify who would recount the ballots. The county canvassing boards were forced to pull together ad hoc teams of judges from various Circuits who had no previous training in handling and interpreting ballots. Furthermore, while others were permitted to observe, they were prohibited from objecting during the recount.

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

[8] The question before the Court is not whether local entities, in the exercise of their expertise, may

develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

Given the Court's assessment that the recount process underway was probably being conducted in an unconstitutional manner, the Court stayed the order directing the recount so it could hear this case and render an expedited decision. The contest provision, as it was mandated by the State Supreme Court, is not well calculated to sustain the confidence that all citizens must have in the outcome of elections. The State has not shown that its procedures include the necessary safeguards. The problem, for instance, of the estimated 110,000 overvotes has not been ***110** addressed, although Chief Justice Wells called attention to the concern in his dissenting opinion. See 772 So.2d, at 1264, n. 26.

[9] Upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. In addition, the Secretary has advised that the recount of only a portion of the ballots requires that the vote tabulation equipment be used to screen out undervotes, a function for which the machines were not designed. If a recount of overvotes were also required, perhaps even a second screening would be necessary. Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary, ****533** as required by Fla. Stat. Ann. § 101.015 (Supp.2001).

The Supreme Court of Florida has said that the legislature intended the State's electors to "participat[e] fully in the federal electoral process," as provided in 3 U.S.C. § 5. 772 So.2d, at 1289; see also *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1220, 1237 (Fla.2000). That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

[10] ***111** Seven Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy. See *post*, at 545 (SOUTER, J., dissenting); *post*, at 551-552 (BREYER, J., dissenting). The only disagreement is as to the remedy. Because the Florida Supreme Court has said that the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5, Justice BREYER's proposed remedy--remanding to the Florida Supreme Court for its ordering of a constitutionally proper contest until December 18-contemplates action in violation of the Florida Election Code, and hence could not be part of an "appropriate" order authorized by Fla. Stat. Ann. § 102.168(8) (Supp.2001).

* * *

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

The judgment of the Supreme Court of Florida is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, concurring.

We join the *per curiam* opinion. We write separately because we believe there are additional grounds that require us to reverse the Florida Supreme Court's decision.

***112** I

We deal here not with an ordinary election, but with an election for the President of the United States. In *Burroughs v. United States,* 290 U.S. 534, 545, 54 S.Ct. 287, 78 L.Ed. 484 (1934), we said:

> "While presidential electors are not officers or agents of the federal government (*In re Green,* 134 U.S. 377, 379, 10 S.Ct. 586, 33 L.Ed. 951 [(1890)]), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."

Likewise, in *Anderson v. Celebrezze,* 460 U.S. 780, 794-795, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (footnote omitted), we ****534** said: "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."

In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. Cf. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See U.S. Const., Art. IV, § 4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, ***113** the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

In *McPherson v. Blacker,* 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869 (1892), we explained that Art. II, § 1, cl. 2, "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment. 146 U.S., at 27, 13 S.Ct. 3. A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.

Title 3 U.S.C. § 5 informs our application of Art. II, § 1, cl. 2, to the Florida statutory scheme, which, as the Florida Supreme Court acknowledged, took that statute into account. Section 5 provides that the State's selection of electors "shall be conclusive, and shall govern in the counting of the electoral votes" if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. As we noted in *Bush v. Palm Beach County Canvassing Bd.,* 531 U.S., at 78, 121 S.Ct. 471, 148 L.Ed.2d 366:

> "Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the Election Code that Congress might deem to be a change in the law."

If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the "safe harbor" provided by § 5.

In Florida, the legislature has chosen to hold statewide elections to appoint the State's 25

electors. Importantly, the legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of ***114** State (Secretary), Fla. Stat. Ann. § 97.012(1) (Supp.2001) , and to state circuit courts, §§ 102.168(1), 102.168(8). Isolated sections of the code may well admit of more than one interpretation, but the general coherence of the legislative scheme may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies. In any election but a Presidential election, the Florida Supreme Court can give as little or as much deference to Florida's executives as it chooses, so far as Article II is concerned, and this Court will have no cause to question the court's actions. But, with respect to a Presidential election, the court must be both mindful of the legislature's role under Article II in choosing the manner of appointing electors and deferential to those ****535** bodies expressly empowered by the legislature to carry out its constitutional mandate.

In order to determine whether a state court has infringed upon the legislature's authority, we necessarily must examine the law of the State as it existed prior to the action of the court. Though we generally defer to state courts on the interpretation of state law--see, *e.g., Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)--there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.

For example, in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), it was argued that we were without jurisdiction because the petitioner had not pursued the correct appellate remedy in Alabama's state courts. Petitioner had sought a state-law writ of certiorari in the Alabama Supreme Court when a writ of mandamus, according to that court, was proper. We found this state-law ground inadequate to defeat our jurisdiction because we were "unable to reconcile the procedural holding of the Alabama Supreme Court" with prior Alabama precedent. *Id.,* at 456, 78 S.Ct. 1163. The purported state-law ground was so novel, in our independent ***115** estimation, that "petitioner could not fairly be deemed to have been apprised of its existence." *Id.,* at 457, 78 S.Ct. 1163.

Six years later we decided *Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), in which the state court had held, contrary to precedent, that the state trespass law applied to black sit-in demonstrators who had consent to enter private property but were then asked to leave. Relying upon *NAACP,* we concluded that the South Carolina Supreme Court's interpretation of a state penal statute had impermissibly broadened the scope of that statute beyond what a fair reading provided, in violation of due process. See 378 U.S., at 361-362, 84 S.Ct. 1697. What we would do in the present case is precisely parallel: hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II. [FN1]

> FN1. Similarly, our jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In one of our oldest cases, we similarly made an independent evaluation of state law in order to protect federal treaty guarantees. In *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch 603, 3 L.Ed. 453 (1813), we disagreed with the Supreme Court of Appeals of Virginia that a 1782 state law had extinguished the property interests of one Denny Fairfax, so that a 1789 ejectment order against Fairfax supported by a 1785 state law did not constitute a future confiscation under the 1783 peace treaty with Great Britain. See *id.,* at 623; *Hunter v. Fairfax's Devisee,* 15 Va. 218, 1 Munf. 218 (1810).

This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally

prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

***116** II

Acting pursuant to its constitutional grant of authority, the Florida Legislature has created a detailed, if not perfectly crafted, statutory scheme that provides for appointment of Presidential electors by direct election. Fla. Stat. Ann. § 103.011 (1992). Under the statute, "[v]otes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates." *Ibid.* The legislature ****536** has designated the Secretary as the "chief election officer," with the responsibility to "[o]btain and maintain uniformity in the application, operation, and interpretation of the election laws." Fla. Stat. Ann. § 97.012 (Supp.2001) . The state legislature has delegated to county canvassing boards the duties of administering elections. § 102.141. Those boards are responsible for providing results to the state Elections Canvassing Commission, comprising the Governor, the Secretary of State, and the Director of the Division of Elections. § 102.111. Cf. *Boardman v. Esteva,* 323 So.2d 259, 268, n. 5 (1975) ("The election process ... is committed to the executive branch of government through duly designated officials all charged with specific duties .... [The] judgments [of these officials] are entitled to be regarded by the courts as presumptively correct ...").

After the election has taken place, the canvassing boards receive returns from precincts, count the votes, and in the event that a candidate was defeated by 0.5% or less, conduct a mandatory recount. Fla. Stat. § 102.141(4) (2000). The county canvassing boards must file certified election returns with the Department of State by 5 p.m. on the seventh day following the election. § 102.112(1). The Elections Canvassing Commission must then certify the results of the election. § 102.111(1).

The state legislature has also provided mechanisms both for protesting election returns and for contesting certified ***117** election results. Section 102.166 governs protests. Any protest must be filed prior to the certification of election results by the county canvassing board. § 102.166(4)(b). Once a protest has been filed, "[t]he county canvassing board may authorize a manual recount." § 102.166(4)(c). If a sample recount conducted pursuant to § 102.166(5) "indicates an error in the vote tabulation which could affect the outcome of the election," the county canvassing board is instructed to: "(a) Correct the error and recount the remaining precincts with the vote tabulation system; (b) Request the Department of State to verify the tabulation software; or (c) Manually recount all ballots," § 102.166(5). In the event a canvassing board chooses to conduct a manual recount of all ballots, § 102.166(7) prescribes procedures for such a recount.

Contests to the certification of an election, on the other hand, are controlled by § 102.168. The grounds for contesting an election include "[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." § 102.168(3)(c). Any contest must be filed in the appropriate Florida circuit court, § 102.168(1), and the canvassing board or election board is the proper party defendant, § 102.168(4). Section 102.168(8) provides that "[t]he circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." In Presidential elections, the contest period necessarily terminates on the date set by 3 U.S.C. § 5 for concluding the State's "final determination" of election controversies.

In its first decision, *Palm Beach Canvassing Bd. v. Harris,* 772 So.2d 1220 (2000) (*Harris I*), the Florida Supreme Court extended the 7-day statutory certification deadline established ***118** by the legislature. [FN2] This modification of the code, by lengthening the protest period, necessarily shortened the contest period for Presidential elections. Underlying the extension of the certification deadline and the shortchanging of the

contest period was, presumably, the clear implication that certification ****537** was a matter of significance: The certified winner would enjoy presumptive validity, making a contest proceeding by the losing candidate an uphill battle. In its latest opinion, however, the court empties certification of virtually all legal consequence during the contest, and in doing so departs from the provisions enacted by the Florida Legislature.

> FN2. We vacated that decision and remanded that case; the Florida Supreme Court reissued the same judgment with a new opinion on December 11, 2000, *Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1273.

The court determined that canvassing boards' decisions regarding whether to recount ballots past the certification deadline (even the certification deadline established by *Harris I*) are to be reviewed *de novo,* although the Election Code clearly vests discretion whether to recount in the boards, and sets strict deadlines subject to the Secretary's rejection of late tallies and monetary fines for tardiness. See Fla. Stat. Ann. § 102.112 (Supp.2001). Moreover, the Florida court held that all late vote tallies arriving during the contest period should be automatically included in the certification regardless of the certification deadline (even the certification deadline established by *Harris I*), thus virtually eliminating both the deadline and the Secretary's discretion to disregard recounts that violate it. [FN3]

> FN3. Specifically, the Florida Supreme Court ordered the Circuit Court to include in the certified vote totals those votes identified for Vice President Gore in Palm Beach County and Miami-Dade County.

Moreover, the court's interpretation of "legal vote," and hence its decision to order a contest-period recount, plainly departed from the legislative scheme. Florida statutory law cannot reasonably be thought to *require* the counting of improperly ***119** marked ballots. Each Florida precinct before election day provides instructions on how properly to cast a vote, Fla. Stat. Ann. § 101.46 (1992); each polling place on election day contains a working model of the voting machine it uses, Fla. Stat. Ann. § 101.5611 (Supp.2001); and each voting booth contains a sample ballot, § 101.46 . In precincts using punchcard ballots, voters are instructed to punch out the ballot cleanly:

> "AFTER VOTING, CHECK YOUR BALLOT CARD TO BE SURE YOUR VOTING SELECTIONS ARE CLEARLY AND CLEANLY PUNCHED AND THERE ARE NO CHIPS LEFT HANGING ON THE BACK OF THE CARD. Instructions to Voters, quoted in Brief for Respondent Harris et al. 13, n. 5.

No reasonable person would call it "an error in the vote tabulation," Fla. Stat. Ann. § 102.166(5) (Supp.2001), or a "rejection of ... legal votes," § 102.168(3)(c), [FN4] when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly and prominently specify. The scheme that the Florida Supreme Court's opinion attributes to the legislature is one in which machines are *required* to be "capable of correctly counting votes," § 101.5606(4), but which nonetheless regularly produces elections in which legal votes are predictably *not* tabulated, so that in close elections manual recounts are regularly required. This is of course absurd. The Secretary, who is authorized by law to issue binding interpretations of the Election Code, §§ 97.012, 106.23, rejected this peculiar reading of the statutes. See DE 00-13 (opinion of the Division of Elections). The Florida Supreme Court, ***120** although it must defer to the Secretary's interpretations, see *Krivanek v. Take Back Tampa Political Committee,* 625 So.2d 840, 844 (Fla.1993) , rejected her reasonable interpretation and embraced the peculiar one. See ****538***Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1273 (2000) (*Harris III*).

> FN4. It is inconceivable that what constitutes a vote that must be counted under the "error in the vote tabulation" language of the protest phase is different from what constitutes a vote that must be counted under the "legal votes" language of the contest phase.

But as we indicated in our remand of the earlier

case, in a Presidential election the clearly expressed intent of the legislature must prevail. And there is no basis for reading the Florida statutes as requiring the counting of improperly marked ballots, as an examination of the Florida Supreme Court's textual analysis shows. We will not parse that analysis here, except to note that the principal provision of the Election Code on which it relied, § 101.5614(5), was, as Chief Justice Wells pointed out in his dissent in *Gore v. Harris*, 772 So.2d 1243, 1267 (2000) *(Harris II)*, entirely irrelevant. The State's Attorney General (who was supporting the Gore challenge) confirmed in oral argument here that never before the present election had a manual recount been conducted on the basis of the contention that "undervotes" should have been examined to determine voter intent. Tr. of Oral Arg. in *Bush v. Palm Beach County Canvassing Bd.*, O.T. 2000, No. 00-836, pp. 39-40, 2000 WL 1763666, at *39-*40; cf. *Broward County Canvassing Board v. Hogan*, 607 So.2d 508, 509 (Fla.Ct.App.1992) (denial of recount for failure to count ballots with "hanging paper chads"). For the court to step away from this established practice, prescribed by the Secretary, the state official charged by the legislature with "responsibility to ... [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws," § 97.012(1), was to depart from the legislative scheme.

III

The scope and nature of the remedy ordered by the Florida Supreme Court jeopardizes the "legislative wish" to take ***121** advantage of the safe harbor provided by 3 U.S.C. § 5. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S., at 78, 121 S.Ct. 471 *(per curiam)*. December 12, 2000, is the last date for a final determination of the Florida electors that will satisfy § 5. Yet in the late afternoon of December 8th--four days before this deadline--the Supreme Court of Florida ordered recounts of tens of thousands of so-called "undervotes" spread through 64 of the State's 67 counties. This was done in a search for elusive--perhaps delusive--certainty as to the exact count of 6 million votes. But no one claims that these ballots have not previously been tabulated; they were initially read by voting machines at the time of the election, and thereafter reread by virtue of Florida's automatic recount provision. No one claims there was any fraud in the election. The Supreme Court of Florida ordered this additional recount under the provision of the Election Code giving the circuit judge the authority to provide relief that is "appropriate under such circumstances." Fla. Stat. Ann. § 102.168(8) (Supp.2001).

Surely when the Florida Legislature empowered the courts of the State to grant "appropriate" relief, it must have meant relief that would have become final by the cutoff date of 3 U.S.C. § 5. In light of the inevitable legal challenges and ensuing appeals to the Supreme Court of Florida and petitions for certiorari to this Court, the entire recounting process could not possibly be completed by that date. Whereas the majority in the Supreme Court of Florida stated its confidence that "the remaining undervotes in these counties can be [counted] within the required time frame," 772 So.2d, at 1262, n. 22, it made no assertion that the seemingly inevitable appeals could be disposed of in that time. Although the Florida Supreme Court has on occasion taken over a year to resolve disputes over local elections, see, *e.g.*, *Beckstrom v. Volusia County Canvassing Bd.*, 707 So.2d 720 (1998) (resolving contest of sheriff's race 16 months after the ***122** election), it has heard and decided the appeals in the present case with great promptness. But the federal deadlines for ****539** the Presidential election simply do not permit even such a shortened process.

As the dissent noted:

> "In [the four days remaining], all questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter in a process open to the public. Fairness dictates that a provision be made for either party to object to how a particular ballot is counted. Additionally, this short time period must allow for judicial review. I respectfully submit this cannot be completed without taking Florida's presidential electors outside the safe harbor provision, creating the very real possibility of disenfranchising those nearly six million voters who are able to correctly cast their ballots on election day." 772 So.2d, at 1269 (opinion of Wells, C.J.) (footnote omitted).

The other dissenters echoed this concern: "[T]he majority is departing from the essential requirements of the law by providing a remedy which is impossible to achieve and which will ultimately lead to chaos." *Id.*, at 1273 (Harding, J., dissenting, jointed by Shaw, J.).

Given all these factors, and in light of the legislative intent identified by the Florida Supreme Court to bring Florida within the "safe harbor" provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an "appropriate" one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.

For these reasons, in addition to those given in the *per curiam* opinion, we would reverse.

***123** Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, dissenting.

The Constitution assigns to the States the primary responsibility for determining the manner of selecting the Presidential electors. See Art. II, § 1, cl. 2. When questions arise about the meaning of state laws, including election laws, it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers. On rare occasions, however, either federal statutes or the Federal Constitution may require federal judicial intervention in state elections. This is not such an occasion.

The federal questions that ultimately emerged in this case are not substantial. Article II provides that "[e]ach *State* shall appoint, in such Manner as the Legislature *thereof* may direct, a Number of Electors." *Ibid.* (emphasis added). It does not create state legislatures out of whole cloth, but rather takes them as they come--as creatures born of, and constrained by, their state constitutions. Lest there be any doubt, we stated over 100 years ago in *McPherson v. Blacker*, 146 U.S. 1, 25, 13 S.Ct. 3, 36 L.Ed. 869 (1892), that "[w]hat is forbidden or required to be done by a State" in the Article II context "is forbidden or required of the legislative power under state constitutions as they exist." In the same vein, we also observed that "[t]he [State's] legislative power is the supreme authority except as limited by the constitution of the State." *Ibid.*; cf. *Smiley v. Holm*, 285 U.S. 355, 367, 52 S.Ct. 397, 76 L.Ed. 795 (1932). [FN1] The legislative ****540** power in Florida is subject to judicial review pursuant ***124** to Article V of the Florida Constitution, and nothing in Article II of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes. The Florida Supreme Court's exercise of appellate jurisdiction therefore was wholly consistent with, and indeed contemplated by, the grant of authority in Article II.

> FN1. "Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view." 285 U.S., at 366, 52 S.Ct. 397. It is perfectly clear that the meaning of the words "Manner" and "Legislature" as used in Article II, § 1, parallels the usage in Article I, § 4, rather than the language in Article V.*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). Article I, § 4, and Article II, § 1, both call upon legislatures to act in a lawmaking capacity whereas Article V simply calls on the legislative body to deliberate upon a binary decision. As a result, petitioners' reliance on *Leser v. Garnett*, 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922), and *Hawke v. Smith (No. 1)*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871 (1920), is misplaced.

It hardly needs stating that Congress, pursuant to 3 U.S.C. § 5, did not impose any affirmative duties upon the States that their governmental branches could "violate." Rather, § 5 provides a safe harbor for States to select electors in contested elections "by judicial or other methods" established by laws prior to the election day. Section 5, like Article II,

assumes the involvement of the state judiciary in interpreting state election laws and resolving election disputes under those laws. Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law.

Nor are petitioners correct in asserting that the failure of the Florida Supreme Court to specify in detail the precise manner in which the "intent of the voter," Fla. Stat. Ann. § 101.5614(5) (Supp.2001), is to be determined rises to the level of a constitutional violation. [FN2] We found such a violation ***125** when individual votes within the same State were weighted unequally, see, *e.g., Reynolds v. Sims,* 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), but we have never before called into question the substantive standard by which a State determines that a vote has been legally cast. And there is no reason to think that the guidance provided to the factfinders, ****541** specifically the various canvassing boards, by the "intent of the voter" standard is any less sufficient--or will lead to results any less uniform--than, for example, the "beyond a reasonable doubt" standard employed every day by ordinary citizens in courtrooms across this country. [FN3]

FN2. The Florida statutory standard is consistent with the practice of the majority of States, which apply either an "intent of the voter" standard or an "impossible to determine the elector's choice" standard in ballot recounts. The following States use an "intent of the voter" standard: Ariz.Rev.Stat. Ann. § 16-645(A) (Supp.2000) (standard for canvassing write-in votes); Conn. Gen.Stat. § 9-150a(j) (1999) (standard for absentee ballots, including three conclusive presumptions); Ind.Code § 3-12-1-1 (1992); Me.Rev.Stat. Ann., Tit. 21-A, § 1(13) (1993); Md. Ann.Code, Art. 33, § 11-302(d) (2000 Supp.) (standard for absentee ballots); Mass. Gen. Laws § 70E (1991) (applying standard to Presidential primaries); Mich. Comp. Laws § 168.799a(3) (Supp.2000); Mo.Rev.Stat. § 115.453(3) (Cum.Supp.1998) (looking to voter's intent where there is substantial compliance with statutory requirements); Tex. Elec.Code Ann. § 65.009(c) (1986); Utah Code Ann. § 20A-4- 104(5)(b) (Supp.2000) (standard for write-in votes), § 20A-4- 105(6)(a) (standard for mechanical ballots); Vt. Stat. Ann., Tit. 17, § 2587(a) (1982); Va.Code Ann. § 24.2-644(A) (2000); Wash. Rev.Code § 29.62.180(1) (Supp.2001) (standard for write-in votes); Wyo. Stat. Ann. § 22-14-104 (1999). The following States employ a standard in which a vote is counted unless it is "impossible to determine the elector's [or voter's] choice": Ala.Code § 11-46-44(c) (1992), Ala.Code § 17-13-2 (1995); Ariz.Rev.Stat. Ann. § 16-610 (1996) (standard for rejecting ballot); Cal. Elec.Code Ann. § 15154(c) (West Supp.2000); Colo.Rev.Stat. § 1-7-309(1) (1999) (standard for paper ballots), § 1-7- 508(2) (standard for electronic ballots); Del.Code Ann., Tit. 15, § 4972(4) (1999); Idaho Code § 34-1203 (1981); Ill. Comp. Stat., ch. 10, § 5/7-51 (1993) (standard for primaries), § 5/17-16 (standard for general elections); Iowa Code § 49.98 (1999); Me.Rev.Stat. Ann., Tit. 21-A §§ 696(2)(B), (4) (Supp.2000); Minn.Stat. § 204C.22(1) (1992); Mont.Code Ann. § 13-15-202 (1997) (not counting votes if "elector's choice cannot be determined"); Nev.Rev.Stat. § 293.367(d) (1995); N.Y. Elec. Law § 9-112(6) (McKinney 1998); N.C. Gen.Stat. §§ 163-169(b), 163-170 (1999); N.D. Cent.Code § 16.1-15- 01(1) (Supp.1999); Ohio Rev.Code Ann. § 3505.28 (1994); Okla. Stat., Tit. 26, § 7-127(6) (1997); Ore.Rev.Stat. § 254.505(1) (1991); S.C.Code Ann. § 7-13-1120 (1977); S.D. Codified Laws § 12-20-7 (1995); Tenn.Code Ann. § 2-7-133(b) (1994); W. Va.Code § 3-6-5(g) (1999).

FN3. Cf. *Victor v. Nebraska,* 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) ("The beyond a reasonable doubt standard is a requirement of due process, but the

> Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so").

***126** Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated--if not eliminated--by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. Of course, as a general matter, "[t]he interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex. v. Pinson,* 282 U.S. 499, 501, 51 S.Ct. 228, 75 L.Ed. 482 (1931) (Holmes, J.). If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ--despite enormous differences in accuracy [FN4]--might run afoul of equal protection. So, too, might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

> FN4. The percentage of nonvotes in this election in counties using a punchcard system was 3.92%; in contrast, the rate of error under the more modern optical-scan systems was only 1.43%. *Siegel v. LePore,* 234 F.3d 1163, 1202, 1213 (charts C and F) (C.A.11, Dec. 6, 2000). Put in other terms, for every 10,000 votes cast, punchcard systems result in 250 more nonvotes than optical-scan systems. A total of 3,718,305 votes were cast under punchcard systems, and 2,353,811 votes were cast under optical-scan systems. *Ibid.*

Even assuming that aspects of the remedial scheme might ultimately be found to violate the Equal Protection Clause, I could not subscribe to the majority's disposition of the case. As the majority explicitly holds, once a state legislature determines to select electors through a popular vote, the right to have one's vote counted is of constitutional stature. As the majority further acknowledges, Florida law holds that all ballots that reveal the intent of the voter constitute valid votes. Recognizing these principles, the majority nonetheless orders the termination of the contest proceeding before all such votes have been tabulated. Under their own reasoning, ***127** the appropriate course of action would be to remand to allow more specific procedures for implementing the legislature's uniform general standard to be established.

In the interest of finality, however, the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent--and are therefore legal votes under state law--but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. *Ante,* at 532. But, as I have already noted, those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. *Supra,* at 540. They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College, 22 J. Legis. 145, 166, n. 154 (1996). [FN5] Thus, nothing prevents the majority, ****542** even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Ante,* at 532.

> FN5. Republican electors were certified by the Acting Governor on November 28, 1960. A recount was ordered to begin on December 13, 1960. Both Democratic and Republican electors met on the appointed day to cast their votes. On January 4, 1961, the newly elected Governor certified the Democratic electors. The certification was received by Congress on January 6, the day the electoral votes were counted. Josephson & Ross, 22 J. Legis., at 166, n. 154.

Finally, neither in this case, nor in its earlier

opinion in *Palm Beach County Canvassing Bd. v. Harris,* 772 So.2d 1220 (2000), did the Florida Supreme Court make any substantive ***128** change in Florida electoral law. [FN6] Its decisions were rooted in long-established precedent and were consistent with the relevant statutory provisions, taken as a whole. It did what courts do [FN7]--it decided the case before it in light of the legislature's intent to leave no legally cast vote uncounted. In so doing, it relied on the sufficiency of the general "intent of the voter" standard articulated by the state legislature, coupled with a procedure for ultimate review by an impartial judge, to resolve the concern about disparate evaluations of contested ballots. If we assume--as I do--that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question.

> FN6. When, for example, it resolved the previously unanswered question whether the word "shall" in Fla. Stat. Ann. § 102.111 (Supp.2001) or the word "may" in § 102.112 governs the scope of the Secretary of State's authority to ignore untimely election returns, it did not "change the law." Like any other judicial interpretation of a statute, its opinion was an authoritative interpretation of what the statute's relevant provisions have meant since they were enacted. *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 312-313, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994).

> FN7. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, ***129** the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

I respectfully dissent.

Justice SOUTER, with whom Justice BREYER joins, and with whom Justice STEVENS and Justice GINSBURG join as to all but Part III, dissenting.

The Court should not have reviewed either *Bush v. Palm Beach County Canvassing Bd.,* 531 U.S., at 70, 121 S.Ct. 471 (*per curiam*), or this case, and should not have stopped Florida's attempt to recount all undervote ballots, see 531 U.S., at 102, 121 S.Ct. 471, by issuing a stay of the Florida Supreme Court's orders during the period of this review, see *Bush v. Gore,* 531 U.S. 1046, 121 S.Ct. 512. If this Court had allowed the State to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review, and political tension could have worked itself out in the Congress following the procedure provided in ****543** 3 U.S.C. § 15. The case being before us, however, its resolution by the majority is another erroneous decision.

As will be clear, I am in substantial agreement with the dissenting opinions of Justice STEVENS, Justice GINSBURG, and Justice BREYER. I write separately only to say how straightforward the issues before us really are.

There are three issues: whether the State Supreme Court's interpretation of the statute providing for a contest of the state election results somehow violates 3 U.S.C. § 5; whether that court's construction of the state statutory provisions governing contests impermissibly changes a state law from what the State's legislature has provided, in violation of Article II, § 1, cl. 2, of the National

Constitution; and whether the manner of interpreting markings on disputed ballots failing to cause machines to register votes for President (the undervote ballots) violates the equal protection or ***130** due process guaranteed by the Fourteenth Amendment. None of these issues is difficult to describe or to resolve.

I

The 3 U.S.C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U.S.C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress.

II

The second matter here goes to the State Supreme Court's interpretation of certain terms in the state statute governing election "contests," Fla. Stat. Ann. § 102.168 (Supp.2001); there is no question here about the state court's interpretation of the related provisions dealing with the antecedent process of "protesting" particular vote counts, § 102.166, which was involved in the previous case, *Bush v. Palm Beach County Canvassing Bd.* The issue is whether the judgment of the State Supreme Court has displaced the state legislature's provisions for election contests: is the law as declared by the court different from the provisions made by the legislature, to which the National Constitution commits responsibility for determining how each State's Presidential electors are chosen? See U.S. Const., Art. II, § 1, cl. 2. Bush does not, of course, claim that any judicial act interpreting a statute of uncertain meaning is enough to displace the legislative provision and violate Article II; statutes require interpretation, which does not without more affect the legislative character ***131** of a statute within the meaning of the Constitution. Brief for Petitioner in *Bush v. Palm Beach County Canvassing Bd.*, O.T. 2000, No. 00-836, p. 48, n. 22 . What Bush does argue, as I understand the contention, is that the interpretation of § 102.168 was so unreasonable as to transcend the accepted bounds of statutory interpretation, to the point of being a nonjudicial act and producing new law untethered to the legislative Act in question.

The starting point for evaluating the claim that the Florida Supreme Court's interpretation effectively rewrote § 102.168 must be the language of the provision on which Gore relies to show his right to raise this contest: that the previously certified result in Bush's favor was produced by "rejection of a number of legal votes sufficient to change or place in doubt the result of the election." Fla. Stat. Ann. § 102.168(3)(c) (Supp.2001). None of the state court's interpretations is unreasonable to the point of displacing the ****544** legislative enactment quoted. As I will note below, other interpretations were of course possible, and some might have been better than those adopted by the Florida court's majority; the two dissents from the majority opinion of that court and various briefs submitted to us set out alternatives. But the majority view is in each instance within the bounds of reasonable interpretation, and the law as declared is consistent with Article II.

1. The statute does not define a "legal vote," the rejection of which may affect the election. The State Supreme Court was therefore required to define it, and in doing that the court looked to another election statute, § 101.5614(5), dealing with damaged or defective ballots, which contains a provision that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by the canvassing board." The court read that objective of looking to the voter's intent as indicating that the legislature probably meant "legal vote" to mean a vote recorded on a ballot indicating what the voter intended. ***132***Gore v. Harris*, 772 So.2d 1243, 1256-1257 (2000). It is perfectly true that the majority might have chosen a different reading. See, *e.g.*, Brief for Respondent Harris et al. 10 (defining "legal votes" as "votes properly executed in accordance with the instructions provided to all registered voters in advance of the

election and in the polling places"). But even so, there is no constitutional violation in following the majority view; Article II is unconcerned with mere disagreements about interpretive merits.

2. The Florida court next interpreted "rejection" to determine what act in the counting process may be attacked in a contest. Again, the statute does not define the term. The court majority read the word to mean simply a failure to count. 772 So.2d, at 1257. That reading is certainly within the bounds of common sense, given the objective to give effect to a voter's intent if that can be determined. A different reading, of course, is possible. The majority might have concluded that "rejection" should refer to machine malfunction, or that a ballot should not be treated as "reject[ed]" in the absence of wrongdoing by election officials, lest contests be so easy to claim that every election will end up in one. Cf. *id.*, at 1266 (Wells, C. J., dissenting). There is, however, nothing nonjudicial in the Florida majority's more hospitable reading.

3. The same is true about the court majority's understanding of the phrase "votes sufficient to change or place in doubt" the result of the election in Florida. The court held that if the uncounted ballots were so numerous that it was reasonably possible that they contained enough "legal" votes to swing the election, this contest would be authorized by the statute. [FN*] While the majority might have thought (as ***133** the trial judge did) that a probability, not a possibility, should be necessary to justify a contest, that reading is not required by the statute's text, which says nothing about probability. Whatever people of good will and good sense may argue about the merits of the Florida court's reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the "legislature" within the meaning of Article II.

> FN* When the Florida court ruled, the totals for Bush and Gore were then less than 1,000 votes apart. One dissent pegged the number of uncounted votes in question at 170,000. *Gore v. Harris,* 772 So.2d 1243, 1272-1273 (2000) (Harding, J., dissenting). Gore's counsel represented to us that the relevant figure is approximately 60,000, Tr. of Oral Arg. 62, the number of ballots in which no vote for President was recorded by the machines.

In sum, the interpretations by the Florida court raise no substantial question under ****545** Article II. That court engaged in permissible construction in determining that Gore had instituted a contest authorized by the state statute, and it proceeded to direct the trial judge to deal with that contest in the exercise of the discretionary powers generously conferred by Fla. Stat. Ann. § 102.168(8) (Supp.2001), to "fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances." As Justice GINSBURG has persuasively explained in her own dissenting opinion, our customary respect for state interpretations of state law counsels against rejection of the Florida court's determinations in this case.

III

It is only on the third issue before us that there is a meritorious argument for relief, as this Court's *per curiam* opinion recognizes. It is an issue that might well have been dealt with adequately by the Florida courts if the state proceedings had not been interrupted, and if not disposed of at the state level it could have been considered by the Congress in any electoral vote dispute. But because the course of ***134** state proceedings has been interrupted, time is short, and the issue is before us, I think it sensible for the Court to address it.

Petitioners have raised an equal protection claim (or, alternatively, a due process claim, see generally *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)), in the charge that unjustifiably disparate standards are applied in different electoral jurisdictions to otherwise identical facts. It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters' intentions; local

variety can be justified by concerns about cost, the potential value of innovation, and so on. But evidence in the record here suggests that a different order of disparity obtains under rules for determining a voter's intent that have been applied (and could continue to be applied) to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics (such as "hanging" or "dimpled" chads). See, *e.g.*, Tr. 238-242 (Dec. 2-3, 2000) (testimony of Palm Beach County Canvassing Board Chairman Judge Charles Burton describing varying standards applied to imperfectly punched ballots in Palm Beach County during precertification manual recount); *id.*, at 497-500 (similarly describing varying standards applied in Miami-Dade County); Tr. of Hearing 8-10 (Dec. 8, 2000) (soliciting from county canvassing boards proposed protocols for determining voters' intent but declining to provide a precise, uniform standard). I can conceive of no legitimate state interest served by these differing treatments of the expressions of voters' fundamental rights. The differences appear wholly arbitrary.

In deciding what to do about this, we should take account of the fact that electoral votes are due to be cast in six days. I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing ***135** treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18. Although one of the dissenting justices of the State Supreme Court estimated that disparate standards potentially affected 170,000 votes, *Gore v. Harris*, 772 So.2d, at 1272-1273, the number at issue is significantly smaller. The 170,000 figure apparently ****546** represents all uncounted votes, both undervotes (those for which no Presidential choice was recorded by a machine) and overvotes (those rejected because of votes for more than one candidate). Tr. of Oral Arg. 61-62. But as Justice BREYER has pointed out, no showing has been made of legal overvotes uncounted, and counsel for Gore made an uncontradicted representation to the Court that the statewide total of undervotes is about 60,000. *Id.*, at 62. To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.

I respectfully dissent.

Justice GINSBURG, with whom Justice STEVENS joins, and with whom Justice SOUTER and Justice BREYER join as to Part I, dissenting.

I

THE CHIEF JUSTICE acknowledges that provisions of Florida's Election Code "may well admit of more than one interpretation." *Ante*, at 534 (concurring opinion). But instead of respecting the state high court's province to say what the State's Election Code means, THE CHIEF JUSTICE maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot ***136** properly be called judging. My colleagues have offered a reasonable construction of Florida's law. Their construction coincides with the view of one of Florida's seven Supreme Court justices. *Gore v. Harris*, 772 So.2d 1243, 1264-1270 (Fla.2000) (Wells, C. J., dissenting); *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1273, 1291-1292 (Fla.2000) (on remand) (confirming, 6 to 1, the construction of Florida law advanced in *Gore*). I might join THE CHIEF JUSTICE were it my commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated. There is no cause here to believe that the members of Florida's high court have done less than "their mortal best to discharge their oath of office," *Sumner v. Mata*, 449 U.S. 539, 549, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), and no cause to upset their reasoned interpretation of Florida law.

This Court more than occasionally affirms statutory, and even constitutional, interpretations

with which it disagrees. For example, when reviewing challenges to administrative agencies' interpretations of laws they implement, we defer to the agencies unless their interpretation violates "the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We do so in the face of the declaration in Article I of the United States Constitution that "All legislative Powers herein granted shall be vested in a Congress of the United States." Surely the Constitution does not call upon us to pay more respect to a federal administrative agency's construction of federal law than to a state high court's interpretation of its own state's law. And not uncommonly, we let stand state-court interpretations of *federal* law with which we might disagree. Notably, in the habeas context, the Court adheres to the view that "there is 'no intrinsic reason why the fact that a man is a federal judge ***137** should make him more competent, or conscientious, or learned with respect to [federal law] than his neighbor in the state courthouse.' " *Stone v. Powell,* 428 U.S. 465, 494, n. 35, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L.Rev. 441, 509 (1963)); see *O'Dell v. Netherland,* 521 U.S. 151, 156, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) ("[T]he *Teague* doctrine validates reasonable, ****547** good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.") (citing *Butler v. McKellar,* 494 U.S. 407, 414, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990)); O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 Wm. & Mary L.Rev. 801, 813 (1981) ("There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions.").

No doubt there are cases in which the proper application of federal law may hinge on interpretations of state law. Unavoidably, this Court must sometimes examine state law in order to protect federal rights. But we have dealt with such cases ever mindful of the full measure of respect we owe to interpretations of state law by a State's highest court. In the Contract Clause case, *General Motors Corp. v. Romein,* 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992), for example, we said that although "ultimately we are bound to decide for ourselves whether a contract was made," the Court "accord [s] respectful consideration and great weight to the views of the State's highest court." *Id.,* at 187, 112 S.Ct. 1105 (citing *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 100, 58 S.Ct. 443, 82 L.Ed. 685 (1938)). And in *Central Union Telephone Co. v. Edwardsville,* 269 U.S. 190, 46 S.Ct. 90, 70 L.Ed. 229 (1925), we upheld the Illinois Supreme Court's interpretation of a state waiver rule, even though that interpretation resulted in the forfeiture of federal constitutional rights. Refusing to supplant Illinois law with a federal definition of waiver, ***138** we explained that the state court's declaration "should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it." *Id.,* at 195, 46 S.Ct. 90. [FN1]

FN1. See also *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1032, n. 18, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (South Carolina could defend a regulatory taking "if an *objectively reasonable application* of relevant precedents [by its courts] would exclude ... beneficial uses in the circumstances in which the land is presently found"); *Bishop v. Wood,* 426 U.S. 341, 344-345, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) (deciding whether North Carolina had created a property interest cognizable under the Due Process Clause by reference to state law as interpreted by the North Carolina Supreme Court). Similarly, in *Gurley v. Rhoden,* 421 U.S. 200, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975), a gasoline retailer claimed that due process entitled him to deduct a state gasoline excise tax in computing the amount of his sales subject to a state sales tax, on the grounds that the legal incidence of the excise tax fell on his customers and that he acted merely as a collector of the tax. The Mississippi Supreme Court held that the legal incidence of the excise tax fell on petitioner. Observing that "a State's highest court is the final judicial arbiter of

> the meaning of state statutes," we said that "[w]hen a state court has made its own definitive determination as to the operating incidence, ... [w]e give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *Id.,* at 208, 95 S.Ct. 1605 (citing *American Oil Co. v. Neill,* 380 U.S. 451, 455-456, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965)).

In deferring to state courts on matters of state law, we appropriately recognize that this Court acts as an " 'outside[r]' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers v. Schein,* 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974). That recognition has sometimes prompted us to resolve doubts about the meaning of state law by certifying issues to a State's highest court, even when federal rights are at stake. Cf. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 79, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) ("Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest ***139** court."). Notwithstanding our authority to decide issues of state law underlying federal claims, we have used the certification device to afford state high courts an opportunity to inform us on matters of their own State's law ****548** because such restraint "helps build a cooperative judicial federalism." *Lehman Brothers,* 416 U.S., at 391, 94 S.Ct. 1741.

Just last Term, in *Fiore v. White,* 528 U.S. 23, 120 S.Ct. 469, 145 L.Ed.2d 353 (1999), we took advantage of Pennsylvania's certification procedure. In that case, a state prisoner brought a federal habeas action claiming that the State had failed to prove an essential element of his charged offense in violation of the Due Process Clause. *Id.,* at 25-26, 120 S.Ct. 469. Instead of resolving the state-law question on which the federal claim depended, we certified the question to the Pennsylvania Supreme Court for that court to "help determine the proper state-law predicate for our determination of the federal constitutional questions raised." *Id.,* at 29, 120 S.Ct. 469; *id.,* at 28, 120 S.Ct. 469 (asking the Pennsylvania Supreme Court whether its recent interpretation of the statute under which Fiore was convicted "was always the statute's meaning, even at the time of Fiore's trial"). THE CHIEF JUSTICE's willingness to *reverse* the Florida Supreme Court's interpretation of Florida law in this case is at least in tension with our reluctance in *Fiore* even to interpret Pennsylvania law before seeking instruction from the Pennsylvania Supreme Court. I would have thought the "cautious approach" we counsel when federal courts address matters of state law, *Arizonans,* 520 U.S., at 77, 117 S.Ct. 1055, and our commitment to "build[ing] cooperative judicial federalism," *Lehman Brothers,* 416 U.S., at 391, 94 S.Ct. 1741, demanded greater restraint.

Rarely has this Court rejected outright an interpretation of state law by a state high court. *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch 603, 3 L.Ed. 453 (1813), *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), and *Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), cited by THE CHIEF JUSTICE, ***140** are three such rare instances. See *ante,* at 535-536, and n. 2. But those cases are embedded in historical contexts hardly comparable to the situation here. *Fairfax's Devisee,* which held that the Virginia Court of Appeals had misconstrued its own forfeiture laws to deprive a British subject of lands secured to him by federal treaties, occurred amidst vociferous States' rights attacks on the Marshall Court. G. Gunther & K. Sullivan, Constitutional Law 61-62 (13th ed.1997). The Virginia court refused to obey this Court's *Fairfax's Devisee* mandate to enter judgment for the British subject's successor in interest. That refusal led to the Court's pathmarking decision in *Martin v. Hunter's Lessee,* 1 Wheat. 304, 4 L.Ed. 97 (1816). *Patterson,* a case decided three months after *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958), in the face of Southern resistance to the civil rights movement, held that the Alabama Supreme Court had irregularly applied its own procedural rules to deny review of a contempt order against the NAACP arising from its refusal to disclose membership lists. We said that "our jurisdiction is

not defeated if the nonfederal ground relied on by the state court is 'without any fair or substantial support.' " 357 U.S., at 455, 78 S.Ct. 1163 (quoting *Ward v. Board of Commr's of Love Cty.,* 253 U.S. 17, 22, 40 S.Ct. 419, 64 L.Ed. 751 (1920)). *Bouie,* stemming from a lunch counter "sit-in" at the height of the civil rights movement, held that the South Carolina Supreme Court's construction of its trespass laws--criminalizing conduct not covered by the text of an otherwise clear statute--was "unforeseeable" and thus violated due process when applied retroactively to the petitioners. 378 U.S., at 350, 354, 84 S.Ct. 1697.

THE CHIEF JUSTICE's casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold. As Justice BREYER convincingly explains, see *post,* at 553-555 (dissenting opinion), this case ***141** involves nothing close to the kind ****549** of recalcitrance by a state high court that warrants extraordinary action by this Court. The Florida Supreme Court concluded that counting every legal vote was the overriding concern of the Florida Legislature when it enacted the State's Election Code. The court surely should not be bracketed with state high courts of the Jim Crow South.

THE CHIEF JUSTICE says that Article II, by providing that state legislatures shall direct the manner of appointing electors, authorizes federal superintendence over the relationship between state courts and state legislatures, and licenses a departure from the usual deference we give to state-court interpretations of state law. *Ante,* at 535 (concurring opinion) ("To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II."). The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments. See U.S. Const., Art. III; The Federalist No. 78 (A.Hamilton). In light of the constitutional guarantee to States of a "Republican Form of Government," U.S. Const., Art. IV, § 4, Article II can hardly be read to invite this Court to disrupt a State's republican regime. Yet THE CHIEF JUSTICE today would reach out to do just that. By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, THE CHIEF JUSTICE contradicts the basic principle that a State may organize itself as it sees fit. See, *e.g., Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign."); *Highland Farms Dairy v. Agnew,* 300 U.S. 608, 612, 57 S.Ct. 549, 81 L.Ed. 835 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question ***142** for the state itself."). [FN2] Article II does not call for the scrutiny undertaken by this Court.

> FN2. Even in the rare case in which a State's "manner" of making and construing laws might implicate a structural constraint, Congress, not this Court, is likely the proper governmental entity to enforce that constraint. See U.S. Const., Amdt. 12; 3 U.S.C. §§ 1-15; cf. *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565, 569, 36 S.Ct. 708, 60 L.Ed. 1172 (1916) (treating as a nonjusticiable political question whether use of a referendum to override a congressional districting plan enacted by the state legislature violates Art. I, § 4); *Luther v. Borden,* 7 How. 1, 42, 12 L.Ed. 581 (1849).

The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to a state high court's interpretations of the State's own law. This principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Saenz v. Roe,* 526 U.S. 489, 504, n. 17, 119 S.Ct. 1518, 143 L.Ed.2d 689 (1999) (citing *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779,

838, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (KENNEDY, J., concurring)). THE CHIEF JUSTICE's solicitude for the Florida Legislature comes at the expense of the more fundamental solicitude we owe to the legislature's sovereign. U.S. Const., Art. II, § 1, cl. 2 ("Each *State* shall appoint, in such Manner as the Legislature *thereof* may direct," the electors for President and Vice President (emphasis added)); *ante,* at 539-540 (STEVENS, J., dissenting). [FN3] Were the other ****550** Members of this Court as mindful as they generally are of our system of dual ***143** sovereignty, they would affirm the judgment of the Florida Supreme Court.

> FN3. "[B]ecause the Framers recognized that state power and identity were essential parts of the federal balance, see The Federalist No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province. The Constitution ... grants States certain powers over the times, places, and manner of federal elections (subject to congressional revision), Art. I, § 4, cl. 1 ..., and allows States to appoint electors for the President, Art. II, § 1, cl. 2 ." *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 841-842, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (KENNEDY, J., concurring).

II

I agree with Justice STEVENS that petitioners have not presented a substantial equal protection claim. Ideally, perfection would be the appropriate standard for judging the recount. But we live in an imperfect world, one in which thousands of votes have not been counted. I cannot agree that the recount adopted by the Florida court, flawed as it may be, would yield a result any less fair or precise than the certification that preceded that recount. See, *e.g., McDonald v. Board of Election Comm'rs of Chicago,* 394 U.S. 802, 809, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969) (even in the context of the right to vote, the State is permitted to reform "one step at a time") (citing *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955)).

Even if there were an equal protection violation, I would agree with Justice STEVENS, Justice SOUTER, and Justice BREYER that the Court's concern about "the December 12 deadline," *ante,* at 533, is misplaced. Time is short in part because of the Court's entry of a stay on December 9, several hours after an able circuit judge in Leon County had begun to superintend the recount process. More fundamentally, the Court's reluctance to let the recount go forward--despite its suggestion that "[t]he search for intent can be confined by specific rules designed to ensure uniform treatment," *ante,* at 530-- ultimately turns on its own judgment about the practical realities of implementing a recount, not the judgment of those much closer to the process.

Equally important, as Justice BREYER explains, *post,* at 556 (dissenting opinion), the December 12 "deadline" for bringing Florida's electoral votes into 3 U.S.C. § 5's safe harbor lacks the significance the Court assigns it. Were that date to pass, Florida would still be entitled to deliver electoral votes Congress *must* count unless both Houses find that the votes "ha [d] not been ... regularly given." 3 U.S.C. § 15. The statute identifies other significant dates. See, *e.g.,* § 7 (specifying ***144** December 18 as the date electors "shall meet and give their votes"); § 12 (specifying "the fourth Wednesday in December"--this year, December 27--as the date on which Congress, if it has not received a State's electoral votes, shall request the state secretary of state to send a certified return immediately). But none of these dates has ultimate significance in light of Congress' detailed provisions for determining, on "the sixth day of January," the validity of electoral votes. § 15.

The Court assumes that time will not permit "orderly judicial review of any disputed matters that might arise." *Ante,* at 533. But no one has doubted the good faith and diligence with which Florida election officials, attorneys for all sides of this controversy, and the courts of law have performed their duties. Notably, the Florida Supreme Court has produced two substantial opinions within 29 hours of oral argument. In sum, the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency

of the United States.

I dissent.

Justice BREYER, with whom Justice STEVENS and Justice GINSBURG join except as to Part I-A-1, and with whom Justice SOUTER joins as to Part I, dissenting.

The Court was wrong to take this case. It was wrong to grant a stay. It should ****551** now vacate that stay and permit the Florida Supreme Court to decide whether the recount should resume.

I

The political implications of this case for the country are momentous. But the federal legal questions presented, with one exception, are insubstantial.

***145** A
1

The majority raises three equal protection problems with the Florida Supreme Court's recount order: first, the failure to include overvotes in the manual recount; second, the fact that *all* ballots, rather than simply the undervotes, were recounted in some, but not all, counties; and third, the absence of a uniform, specific standard to guide the recounts. As far as the first issue is concerned, petitioners presented no evidence, to this Court or to any Florida court, that a manual recount of overvotes would identify additional legal votes. The same is true of the second, and, in addition, the majority's reasoning would seem to invalidate any state provision for a manual recount of individual counties in a statewide election.

The majority's third concern does implicate principles of fundamental fairness. The majority concludes that the Equal Protection Clause requires that a manual recount be governed not only by the uniform general standard of the "clear intent of the voter," but also by uniform subsidiary standards (for example, a uniform determination whether indented, but not perforated, "undervotes" should count). The opinion points out that the Florida Supreme Court ordered the inclusion of Broward County's undercounted "legal votes" even though those votes included ballots that were not perforated but simply "dimpled," while newly recounted ballots from other counties will likely include only votes determined to be "legal" on the basis of a stricter standard. In light of our previous remand, the Florida Supreme Court may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II. However, since the use of different standards could favor one or the other of the candidates, since time was, and is, too short to permit the lower courts to iron out significant differences through ordinary ***146** judicial review, and since the relevant distinction was embodied in the order of the State's highest court, I agree that, in these very special circumstances, basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem. In light of the majority's disposition, I need not decide whether, or the extent to which, as a remedial matter, the Constitution would place limits upon the content of the uniform standard.

2

Nonetheless, there is no justification for the majority's remedy, which is simply to reverse the lower court and halt the recount entirely. An appropriate remedy would be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting *all* undercounted votes in Florida, including those from Broward, Volusia, Palm Beach, and Miami-Dade Counties, whether or not previously recounted prior to the end of the protest period, and to do so in accordance with a single uniform standard.

The majority justifies stopping the recount entirely on the ground that there is no more time. In particular, the majority relies on the lack of time for the Secretary of State (Secretary) to review and approve equipment needed to separate undervotes. But the majority reaches this conclusion in the absence of *any* record evidence that the recount could not have been completed in the time allowed by the Florida Supreme Court. The majority finds facts outside of the record on matters that state ****552** courts are in a far better position to address.

Of course, it is too late for any such recount to take place by December 12, the date by which election disputes must be decided if a State is to take advantage of the safe harbor provisions of 3 U.S.C. § 5. Whether there is time to conduct a recount prior to December 18, when the electors are scheduled to meet, is a matter for the state courts to determine. And whether, under Florida law, Florida ***147** could or could not take further action is obviously a matter for Florida courts, not this Court, to decide. See *ante,* at 533 *(per curiam).*

By halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, this Court crafts a remedy out of proportion to the asserted harm. And that remedy harms the very fairness interests the Court is attempting to protect. The manual recount would itself redress a problem of unequal treatment of ballots. As Justice STEVENS points out, see *ante,* at 541, and n. 4 (dissenting opinion), the ballots of voters in counties that use punchcard systems are more likely to be disqualified than those in counties using optical-scanning systems. According to recent news reports, variations in the undervote rate are even more pronounced. See Fessenden, No-Vote Rates Higher in Punch Card Count, N.Y. Times, Dec. 1, 2000, p. A29 (reporting that 0.3% of ballots cast in 30 Florida counties using optical-scanning systems registered no Presidential vote, in comparison to 1.53% in the 15 counties using Votomatic punchcard ballots). Thus, in a system that allows counties to use different types of voting systems, voters already arrive at the polls with an unequal chance that their votes will be counted. I do not see how the fact that this results from counties' selection of different voting machines rather than a court order makes the outcome any more fair. Nor do I understand why the Florida Supreme Court's recount order, which helps to redress this inequity, must be entirely prohibited based on a deficiency that could easily be remedied.

B

The remainder of petitioners' claims, which are the focus of THE CHIEF JUSTICE's concurrence, raise no significant federal questions. I cannot agree that THE CHIEF JUSTICE's unusual review of state law in this case, see *ante,* at 545-550 (GINSBURG, J., dissenting), is justified by reference either to Art. II, § 1, or to 3 U.S.C. § 5. Moreover, even were such ***148** review proper, the conclusion that the Florida Supreme Court's decision contravenes federal law is untenable.

While conceding that, in most cases, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law," the concurrence relies on some combination of Art. II, § 1, and 3 U.S.C. § 5 to justify its conclusion that this case is one of the few in which we may lay that fundamental principle aside. *Ante,* at 534 (opinion of REHNQUIST, C.J.) The concurrence's primary foundation for this conclusion rests on an appeal to plain text: Art. II, § 1's grant of the power to appoint Presidential electors to the state "Legislature." *Ibid.* But neither the text of Article II itself nor the only case the concurrence cites that interprets Article II, *McPherson v. Blacker,* 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869 (1892), leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors. See *id.,* at 41, 13 S.Ct. 3 (specifically referring to state constitutional provision in upholding state law regarding selection of electors). Nor, as Justice STEVENS points out, have we interpreted the federal constitutional provision most analogous to Art. II, § 1--Art. I, § 4--in the strained manner put forth in the concurrence. *Ante,* at 539-540 and n. 1 (dissenting opinion).

The concurrence's treatment of § 5 as "inform[ing]" its interpretation of ****553**Article II, § 1, cl. 2, *ante,* at 534 (opinion of REHNQUIST, C. J.), is no more convincing. THE CHIEF JUSTICE contends that our opinion in *Bush v. Palm Beach County Canvassing Bd.,* 531 U.S., at 70, 121 S.Ct. 471 *(per curiam) (Bush I),* in which we stated that "a legislative wish to take advantage of [§ 5] would counsel against" a construction of Florida law that Congress might deem to be a change in law, 531 U.S., at 78, 121 S.Ct. 471, now means that *this* Court "must ensure that post-election state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5." *Ante,* at 534. However, § 5 is part of the rules that govern Congress' recognition of slates of electors.

Nowhere in *Bush I* did we ***149** establish that *this* Court had the authority to enforce § 5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence does here, that a state-court decision that threatens the safe harbor provision of § 5 does so in violation of Article II. The concurrence's logic turns the presumption that legislatures would wish to take advantage of § 5's "safe harbor" provision into a mandate that trumps other statutory provisions and overrides the intent that the legislature *did* express.

But, in any event, the concurrence, having conducted its review, now reaches the wrong conclusion. It says that "the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II." *Ante,* at 535 (opinion of REHNQUIST, C.J.). But what precisely is the distortion? Apparently, it has three elements. First, the Florida court, in its earlier opinion, changed the election certification date from November 14 to November 26. Second, the Florida court ordered a manual recount of "undercounted" ballots that could not have been fully completed by the December 12 "safe harbor" deadline. Third, the Florida court, in the opinion now under review, failed to give adequate deference to the determinations of canvassing boards and the Secretary.

To characterize the first element as a "distortion," however, requires the concurrence to second-guess the way in which the state court resolved a plain conflict in the language of different statutes. Compare Fla. Stat. Ann. § 102.166 (Supp.2001) (foreseeing manual recounts during the protest period) with § 102.111 (setting what is arguably too short a deadline for manual recounts to be conducted); compare § 102.112(1) (stating that the Secretary "may" ignore late returns) with § 102.111(1) (stating that the Secretary "shall" ignore late returns). In any event, that issue no longer has ***150** any practical importance and cannot justify the reversal of the different Florida court decision before us now.

To characterize the second element as a "distortion" requires the concurrence to overlook the fact that the inability of the Florida courts to conduct the recount on time is, in significant part, a problem of the Court's own making. The Florida Supreme Court thought that the recount could be completed on time, and, within hours, the Florida Circuit Court was moving in an orderly fashion to meet the deadline. This Court improvidently entered a stay. As a result, we will never know whether the recount could have been completed.

Nor can one characterize the third element as "impermissibl[e] distort[ion]" once one understands that there are two sides to the opinion's argument that the Florida Supreme Court "virtually eliminat[ed] the Secretary's discretion." *Ante,* at 535, 537 (REHNQUIST, C.J., concurring). The Florida statute in question was amended in 1999 to provide that the "grounds for contesting an election" include the "rejection of a number of legal votes sufficient to ... place in doubt the result of the election." Fla. Stat. Ann. §§ 102.168(3), (3)(c) (Supp.2001). And the parties have argued about the proper meaning of the statute's term ****554** "legal vote." The Secretary has claimed that a "legal vote" is a vote "properly executed in accordance with the instructions provided to all registered voters." Brief for Respondent Harris et al. 10. On that interpretation, punchcard ballots for which the machines cannot register a vote are not "legal" votes. *Id.,* at 14. The Florida Supreme Court did not accept her definition. But it had a reason. Its reason was that a different provision of Florida election laws (a provision that addresses damaged or defective ballots) says that no vote shall be disregarded "if there is a clear indication of the intent of the voter as determined by the canvassing board" (adding that ballots should not be counted "if it is impossible to determine the elector's choice"). Fla. Stat. Ann. § 101.5614(5) (Supp.2001) . Given ***151** this statutory language, certain roughly analogous judicial precedent, *e.g., Darby v. State ex rel. McCollough,* 73 Fla. 922, 75 So. 411 (1917) *(per curiam),* and somewhat similar determinations by courts throughout the Nation, see cases cited *infra,* at 555, the Florida Supreme Court concluded that the term "legal vote" means a vote recorded on a ballot that clearly reflects what the voter intended. *Gore v. Harris,* 772 So.2d 1243, 1254. That conclusion differs from the conclusion of the Secretary. But nothing in Florida law

requires the Florida Supreme Court to accept as determinative the Secretary's view on such a matter. Nor can one say that the court's ultimate determination is so unreasonable as to amount to a constitutionally "impermissible distort[ion]" of Florida law.

The Florida Supreme Court, applying this definition, decided, on the basis of the record, that respondents had shown that the ballots undercounted by the voting machines contained enough "legal votes" to place "the result[s]" of the election "in doubt." Since only a few hundred votes separated the candidates, and since the "undercounted" ballots numbered tens of thousands, it is difficult to see how anyone could find this conclusion unreasonable-however strict the standard used to measure the voter's "clear intent." Nor did this conclusion "strip" canvassing boards of their discretion. The boards retain their traditional discretionary authority during the protest period. And during the contest period, as the court stated, "the Canvassing Board's actions [during the protest period] may constitute evidence that a ballot does or does not qualify as a legal vote." *Id.,* at 1260. Whether a local county canvassing board's discretionary judgment during the protest period not to conduct a manual recount will be set aside during a contest period depends upon whether a candidate provides additional evidence that the rejected votes contain enough "legal votes" to place the outcome of the race in doubt. To limit the local canvassing ***152** board's discretion in this way is not to eliminate that discretion. At the least, one could reasonably so believe.

The statute goes on to provide the Florida circuit judge with authority to "fashion such orders as he or she deems necessary to ensure that each allegation ... is *investigated, examined, or checked,* ... and to provide any relief appropriate." Fla. Stat. Ann. § 102.168(8) (Supp.2001) (emphasis added). The Florida Supreme Court did just that. One might reasonably disagree with the Florida Supreme Court's interpretation of these, or other, words in the statute. But I do not see how one could call its plain language interpretation of a 1999 statutory change so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the state legislature. Indeed, other state courts have interpreted roughly similar state statutes in similar ways. See, *e.g., In re Election of U.S. Representative for Second Congressional Dist.,* 231 Conn. 602, 621, 653 A.2d 79, 90-91 (1994) ("Whatever the process used to vote and to count votes, differences in technology should not furnish a basis for disregarding the bedrock principle that the purpose of the voting process is to ascertain the intent of the ****555** voters"); *Brown v. Carr,* 130 W.Va. 455, 460, 43 S.E.2d 401, 404-405 (1947) ("[W]hether a ballot shall be counted ... depends on the intent of the voter.... Courts decry any resort to technical rules in reaching a conclusion as to the intent of the voter").

I repeat, where is the "impermissible" distortion?

II

Despite the reminder that this case involves "an election for the President of the United States," *ante,* at 533 (REHNQUIST, C. J., concurring), no preeminent legal concern, or practical concern related to legal questions, required this Court to hear this case, let alone to issue a stay that stopped Florida's recount process in its tracks. With one exception, petitioners' claims do not ask us to vindicate a constitutional ***153** provision designed to protect a basic human right. See, *e.g., Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). Petitioners invoke fundamental fairness, namely, the need for procedural fairness, including finality. But with the one "equal protection" exception, they rely upon law that focuses, not upon that basic need, but upon the constitutional allocation of power. Respondents invoke a competing fundamental consideration--the need to determine the voter's true intent. But they look to state law, not to federal constitutional law, to protect that interest. Neither side claims electoral fraud, dishonesty, or the like. And the more fundamental equal protection claim might have been left to the state court to resolve if and when it was discovered to have mattered. It could still be resolved through a remand conditioned upon issuance of a uniform standard; it does not require reversing the Florida Supreme Court.

Of course, the selection of the President is of fundamental national importance. But that

importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.

The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a road-map of how to resolve disputes about electors, even after an election as close as this one. That road-map foresees resolution of electoral disputes by *state* courts. See 3 U.S.C. § 5 (providing that, where a "State shall have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of ... electors ... by *judicial* or other methods," the subsequently chosen electors enter a safe harbor free from congressional challenge). But it nowhere provides for involvement by the United States Supreme Court.

To the contrary, the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute, the Electoral Count Act, enacted ***154** after the close 1876 Hayes-Tilden Presidential election, specifies that, after States have tried to resolve disputes (through "judicial" or other means), Congress is the body primarily authorized to resolve remaining disputes. See Electoral Count Act of 1887, 24 Stat. 373, 3 U.S.C. §§ 5, 6, and 15.

The legislative history of the Act makes clear its intent to commit the power to resolve such disputes to Congress, rather than the courts:

> "The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes....
>
> . . . . .
>
> "The power to determine rests with the two houses, and there is no other constitutional tribunal." H.R. Rep. No. 1638, 49th Cong., 1st Sess., 2 (1886) (report submitted by Rep. Caldwell, Select Committee on the Election of President and Vice-President).

****556** The Member of Congress who introduced the Act added:

> "The power to judge of the legality of the votes is a necessary consequent of the power to count. The existence of this power is of absolute necessity to the preservation of the Government. The interests of all the States in their relations to each other in the Federal Union demand that the ultimate tribunal to decide upon the election of President should be a constituent body, in which the States in their federal relationships and the people in their sovereign capacity should be represented." 18 Cong. Rec. 30 (1886) (remarks of Rep. Caldwell).
>
> "Under the Constitution who else could decide? Who is nearer to the State in determining a question of vital importance to the whole union of States than the constituent body upon whom the Constitution has devolved the duty to count the vote?" *Id.*, at 31.

***155** The Act goes on to set out rules for the congressional determination of disputes about those votes. If, for example, a State submits a single slate of electors, Congress must count those votes unless both Houses agree that the votes "have not been ... regularly given." 3 U.S.C. § 15. If, as occurred in 1876, a State submits two slates of electors, then Congress must determine whether a slate has entered the safe harbor of § 5, in which case its votes will have "conclusive" effect. *Ibid.* If, as also occurred in 1876, there is controversy about "which of two or more of such State authorities ... is the lawful tribunal" authorized to appoint electors, then each House shall determine separately which votes are "supported by the decision of such State so authorized by its law." *Ibid.* If the two Houses of Congress agree, the votes they have approved will be counted. If they disagree, then "the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted." *Ibid.*

Given this detailed, comprehensive scheme for counting electoral votes, there is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. Nor, for that matter, is there any reason to think that the Constitution's Framers would have reached a different conclusion. Madison, at least, believed that allowing the judiciary to choose the Presidential electors "was out of the question."

Madison, July 25, 1787 (reprinted in 5 Elliot's Debates on the Federal Constitution 363 (2d ed. 1876)).

The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal Presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about.

***156** Moreover, Congress was fully aware of the danger that would arise should it ask judges, unarmed with appropriate legal standards, to resolve a hotly contested Presidential election contest. Just after the 1876 Presidential election, Florida, South Carolina, and Louisiana each sent two slates of electors to Washington. Without these States, Tilden, the Democrat, had 184 electoral votes, one short of the number required to win the Presidency. With those States, Hayes, his Republican opponent, would have had 185. In order to choose between the two slates of electors, Congress decided to appoint an electoral commission composed of five Senators, five Representatives, and five Supreme Court Justices. Initially the Commission was to be evenly divided between Republicans and Democrats, with Justice David Davis, an Independent, to possess the decisive vote. However, when at the last minute the Illinois Legislature elected Justice Davis to the United States Senate, the final position on the Commission was ****557** filled by Supreme Court Justice Joseph P. Bradley.

The Commission divided along partisan lines, and the responsibility to cast the deciding vote fell to Justice Bradley. He decided to accept the votes by the Republican electors, and thereby awarded the Presidency to Hayes.

Justice Bradley immediately became the subject of vociferous attacks. Bradley was accused of accepting bribes, of being captured by railroad interests, and of an eleventh-hour change in position after a night in which his house "was surrounded by the carriages" of Republican partisans and railroad officials. C. Woodward, Reunion and Reaction 159-160 (1966). Many years later, Professor Bickel concluded that Bradley was honest and impartial. He thought that " 'the great question' for Bradley was, in fact, whether Congress was entitled to go behind election returns or had to accept them as certified by state authorities," an "issue of principle." The Least Dangerous Branch 185 (1962). Nonetheless, Bickel points out, the legal question upon which Justice ***157** Bradley's decision turned was not very important in the contemporaneous political context. He says that "in the circumstances the issue of principle was trivial, it was overwhelmed by all that hung in the balance, and it should not have been decisive." *Ibid.*

For present purposes, the relevance of this history lies in the fact that the participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. And the Congress that later enacted the Electoral Count Act knew it.

This history may help to explain why I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount. Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the "strangeness of the issue," its "intractability to principled resolution," its "sheer momentousness, ... which tends to unbalance judicial judgment," and "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from." *Id.*, at 184. Those characteristics mark this case.

At the same time, as I have said, the Court is not acting to vindicate a fundamental constitutional principle, such as the need to protect a basic human liberty. No other strong reason to act is present. Congressional statutes tend to obviate the need. And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court

itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally ***158** necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!" D. Loth, Chief Justice John Marshall and The Growth of the American Republic 365 (1948). But we do risk a self-inflicted wound--a wound that may harm not just the Court, but the Nation.

I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." ****558***United States v. Butler,* 297 U.S. 1, 79, 56 S.Ct. 312, 80 L.Ed. 477 (1936) (Stone, J., dissenting). Justice Brandeis once said of the Court, "The most important thing we do is not doing." Bickel, *supra,* at 71. What it does today, the Court should have left undone. I would repair the damage done as best we now can, by permitting the Florida recount to continue under uniform standards.

I respectfully dissent.

531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388, 69 USLW 4029, 00 Cal. Daily Op. Serv. 9879, 2000 Daily Journal D.A.R. 13,163, 14 Fla. L. Weekly Fed. S 26

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530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502, 68 USLW 4604, 00 Cal. Daily Op. Serv. 5083, 2000 Daily Journal D.A.R. 6777, 2000 CJ C.A.R. 3867
(Cite as: 530 U.S. 567, 120 S.Ct. 2402)

Briefs and Other Related Documents

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, et al., Petitioners,
v.
Bill JONES, Secretary of State of California, et al.

No. 99-401.

Argued April 24, 2000.
Decided June 26, 2000.

Action was brought challenging constitutionality of California proposition which converted State's primary election from closed to blanket primary in which voters could vote for any candidate regardless of voter's or candidate's party affiliation. The United States District Court for the Eastern District of California, David F. Levi, J., 984 F.Supp. 1288, upheld proposition. On appeal, the United States Court of Appeals for the Ninth Circuit, 169 F.3d 646, affirmed. Certiorari was granted. The Supreme Court, Justice Scalia, held that California's blanket primary violated political parties' First Amendment right of association.

Reversed.

Justice Kennedy filed concurring opinion.

Justice Stevens filed dissenting opinion in which Justice Ginsburg joined in part.

West Headnotes

[1] Elections ⇐21
144k21 Most Cited Cases
In order to avoid burdening general election ballot with frivolous candidacies, State may require parties to demonstrate significant modicum of support before allowing their candidates a place on that ballot.

[2] Elections ⇐105
144k105 Most Cited Cases
In order to prevent "party raiding," a process in which dedicated members of one party formally switch to another party to alter outcome of that party's primary, State may require party registration a reasonable period of time before primary election.

[3] Constitutional Law ⇐91
92k91 Most Cited Cases
[3] Elections ⇐120
144k120 Most Cited Cases
California's "blanket primary," in which voters could vote for any candidate regardless of voter's or candidate's party affiliation, violated political parties' First Amendment right of association; blanket primary forced political parties to associate with those who, at best, had refused to affiliate with the party, and, at worst, had expressly affiliated with a rival, and state interests in producing elected officials who better represented electorate, expanding candidate debate beyond scope of partisan concerns, ensuring that disenfranchised persons enjoyed right to effective vote, promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy, were illegitimate or not sufficiently compelling to justify California's intrusion into parties' associational rights. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Elec.Code §§ 2150, 2151.

[4] Constitutional Law ⇐91
92k91 Most Cited Cases
[4] Elections ⇐120
144k120 Most Cited Cases
California's blanket primary, in which voters could vote for any candidate regardless of voter's or candidate's party affiliation, could not be justified by state's interests in producing elected officials who better represented electorate and expanding candidate debate beyond scope of partisan concerns; such "interests" reduced to nothing more than stark repudiation of freedom of association. U.S.C.A. Const.Amend. 1; West's

Ann.Cal.Elec.Code §§ 2150, 2151.

[5] Constitutional Law ⚿91

92k91 Most Cited Cases

[5] Elections ⚿120

144k120 Most Cited Cases

California's blanket primary, in which voters could vote for any candidate regardless of voter's or candidate's party affiliation, could not be justified by state's interests in ensuring that disenfranchised persons enjoyed right to effective vote; nonmember's desire to participate in party's affairs was overborne by countervailing and legitimate associational right of party to determine its own membership qualifications. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Elec.Code §§ 2150 , 2151.

[6] Constitutional Law ⚿91

92k91 Most Cited Cases

[6] Elections ⚿120

144k120 Most Cited Cases

State interests in promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy were not sufficiently compelling to justify intrusion into political parties' associational rights through California's blanket primary, in which voters could vote for any candidate regardless of voter's or candidate's party affiliation, and even if interests were compelling, blanket primary was not narrowly tailored means of furthering them. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Elec.Code §§ 2150, 2151.

****2404** ***567** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

One way that candidates for public office in California gain access to the general ballot is by winning a qualified political party's primary. In 1996, Proposition 198 changed the State's partisan primary from a closed primary, in which only a political party's members can vote on its nominees, to a blanket primary, in which each voter's ballot lists every candidate regardless of party affiliation and allows the voter to choose freely among them. The candidate of each party who wins the most votes is that party's nominee for the general election. Each of petitioner political parties prohibits nonmembers from voting in the party's primary. They filed suit against respondent state official, alleging, *inter alia,* that the blanket primary violated their First Amendment rights of association. Respondent Californians for an Open Primary intervened. The District Court held that the primary's burden on petitioners' associational rights was not severe and was justified by substantial state interests. The Ninth Circuit affirmed.

Held: California's blanket primary violates a political party's First Amendment right of association. Pp. 2406-2414.

(a) States play a major role in structuring and monitoring the primary election process, but the processes by which political parties select their nominees are not wholly public affairs that States may regulate freely. To the contrary, States must act within limits imposed by the Constitution when regulating parties' internal processes. See, *e.g., Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271. Respondents misplace their reliance on *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, and *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152, which held not that party affairs are public affairs, free of First Amendment protections, see, *e.g., Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514, but only that, when a State prescribes an election process that gives a special role to political parties, the parties' discriminatory action becomes state action under the Fifteenth Amendment. This Nation has a tradition of political associations in which citizens band together to promote candidates who espouse their political views. The First Amendment protects the freedom to join together to further common political beliefs, *id.,* at 214-215, 107 S.Ct. 544, which presupposes the freedom to identify those who constitute the ***568** association, and to limit the association to those people, *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 122, 101 S.Ct. 1010, 67 L.Ed.2d 82. In no area is the political association's right to exclude more important than in

its candidate-selection process. That process often determines the party's positions on significant public policy issues, and it is the nominee who is the party's ambassador charged with winning the general electorate over to its views. The First Amendment reserves a special place, and accords a special protection, for that process, *Eu, supra,* at 224, 109 S.Ct. 1013, because the moment of choosing the party's nominee is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power, *Tashjian, supra, at 216, 107* S.Ct. 544. California's blanket primary violates these principles. Proposition 198 forces petitioners ****2405** to adulterate their candidate-selection process--a political party's basic function--by opening it up to persons wholly unaffiliated with the party, who may have different views from the party. Such forced association has the likely outcome--indeed, it is Proposition 198's intended outcome--of changing the parties' message. Because there is no heavier burden on a political party's associational freedom, Proposition 198 is unconstitutional unless it is narrowly tailored to serve a compelling state interest. See *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589. Pp. 2406-2412.

(b) None of respondents' seven proffered state interests--producing elected officials who better represent the electorate, expanding candidate debate beyond the scope of partisan concerns, ensuring that disenfranchised persons enjoy the right to an effective vote, promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy--is a compelling interest justifying California's intrusion into the parties' associational rights. Pp. 2412-2414.

169 F.3d 646, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 2414. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part I, *post,* p. 2416.

George Waters, for petitioners.

Thomas F. Gede, Sacramento, CA, for respondents.

***569** Justice SCALIA delivered the opinion of the Court.

This case presents the question whether the State of California may, consistent with the First Amendment to the United States Constitution, use a so-called "blanket" primary to determine a political party's nominee for the general election.

I

Under California law, a candidate for public office has two routes to gain access to the general ballot for most state and federal elective offices. He may receive the nomination of a qualified political party by winning its primary, [FN1] see Cal. ***570** Elec.Code Ann. §§ 15451, 13105(a) (West 1996); or he may file as an independent by obtaining (for a statewide race) the signatures of one percent of the State's electorate or (for other races) the signatures of three percent of the voting population of the area represented by the office in contest, see § 8400.

> FN1. A party is qualified if it meets one of three conditions: (1) in the last gubernatorial election, one of its statewide candidates polled at least two percent of the statewide vote; (2) the party's membership is at least one percent of the statewide vote at the last preceding gubernatorial election; or (3) voters numbering at least 10 percent of the statewide vote at the last gubernatorial election sign a petition stating that they intend to form a new party. See Cal. Elec.Code Ann. § 5100 (West 1996 and Supp.2000).

Until 1996, to determine the nominees of qualified parties California held what is known as a "closed" partisan primary, in which only persons who are members of the political party--*i.e.,* who have declared affiliation with that party when they register to vote, see Cal. Elec.Code Ann. §§ 2150, 2151 (West 1996 and Supp.2000)--can vote on its nominee, see Cal. Elec.Code Ann. § 2151 (West 1996). In 1996 the citizens of California adopted by initiative Proposition 198. Promoted largely as

a measure that would "weaken" party "hard-liners" and ease the way for "moderate problem-solvers," App. 89-90 (reproducing ballot pamphlet distributed ****2406** to voters), Proposition 198 changed California's partisan primary from a closed primary to a blanket primary. Under the new system, "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote ... for any candidate regardless of the candidate's political affiliation." Cal. Elec.Code Ann. § 2001 (West Supp.2000); see also § 2151. Whereas under the closed primary each voter received a ballot limited to candidates of his own party, as a result of Proposition 198 each voter's primary ballot now lists every candidate regardless of party affiliation and allows the voter to choose freely among them. It remains the case, however, that the candidate of each party who wins the greatest number of votes "is the nominee of that party at the ensuing general election." Cal. Elec.Code Ann. § 15451 (West 1996). [FN2]

FN2. California's new blanket primary system does not apply directly to the apportionment of Presidential delegates. See Cal. Elec.Code Ann. §§ 15151, 15375, 15500 (West Supp.2000). Instead, the State tabulates the Presidential primary in two ways: according to the number of votes each candidate received from the entire voter pool and according to the amount each received from members of his own party. The national parties may then use the latter figure to apportion delegates. Nor does it apply to the election of political party central or district committee members; only party members may vote in these elections. See Cal. Elec.Code Ann. § 2151 (West 1996 and Supp.2000).

***571** Petitioners in this case are four political parties--the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party--each of which has a rule prohibiting persons not members of the party from voting in the party's primary. [FN3] Petitioners brought suit in the United States District Court for the Eastern District of California against respondent California Secretary of State, alleging, *inter alia,* that California's blanket primary violated their First Amendment rights of association, and seeking declaratory and injunctive relief. The group Californians for an Open Primary, also respondent, intervened as a party defendant. The District Court recognized that the new law would inject into each party's primary substantial numbers of voters unaffiliated with the party. 984 F.Supp. 1288, 1298-1299 (1997). It further recognized that this might result in selection of a nominee different from the one party members would select, or at the least cause the same nominee to commit himself to different positions. *Id.,* at 1299. Nevertheless, the District Court held that the burden on petitioners' rights of association was not a severe one, and was justified by state interests ultimately reducing to this: "enhanc[ing] the democratic nature of the election process and the representativeness of elected officials." *Id.,* at 1301. The Ninth Circuit, adopting the District Court's opinion as its own, affirmed. 169 F.3d 646 (1999). We granted certiorari. 528 U.S. 1133, 120 S.Ct. 977, 145 L.Ed.2d 926 (2000).

FN3. Each of the four parties was qualified under California law when they filed this suit. Since that time, the Peace and Freedom Party has apparently lost its qualified status. See Brief for Petitioners 16 (citing Child of the '60s Slips, Los Angeles Times, Feb. 17, 1999, p. B-6).

***572** II

Respondents rest their defense of the blanket primary upon the proposition that primaries play an integral role in citizens' selection of public officials. As a consequence, they contend, primaries are public rather than private proceedings, and the States may and must play a role in ensuring that they serve the public interest. Proposition 198, respondents conclude, is simply a rather pedestrian example of a State's regulating its system of elections.

[1][2] We have recognized, of course, that States have a major role to play in structuring and monitoring the election process, including primaries. See ****2407***Burdick v. Takushi,* 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992);

Tashjian v. Republican Party of Conn., 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986). We have considered it "too plain for argument," for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion. *American Party of Tex. v. White*, 415 U.S. 767, 781, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); see also *Tashjian, supra*, at 237, 107 S.Ct. 544 (SCALIA, J., dissenting). Similarly, in order to avoid burdening the general election ballot with frivolous candidacies, a State may require parties to demonstrate "a significant modicum of support" before allowing their candidates a place on that ballot. See *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). Finally, in order to prevent "party raiding"--a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary--a State may require party registration a reasonable period of time before a primary election. See *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). Cf. *Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973) (23-month waiting period unreasonable).

What we have not held, however, is that the processes by which political parties select their nominees are, as respondents would have it, wholly public affairs that States ***573** may regulate freely. [FN4] To the contrary, we have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution. See, *e.g., Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). In this regard, respondents' reliance on *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and *Terry v. Adams*, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), is misplaced. In *Allwright*, we invalidated the Texas Democratic Party's rule limiting participation in its primary to whites; in *Terry*, we invalidated the same rule promulgated by the Jaybird Democratic Association, a "self-governing voluntary club," 345 U.S., at 463, 73 S.Ct. 809. These cases held only that, when a State prescribes an election process that gives a special role to political parties, it "endorses, adopts and enforces the discrimination against Negroes" that the parties (or, in the case of the Jaybird Democratic Association, organizations that are "part and parcel" of the parties, see *id.*, at 482, 73 S.Ct. 809 (Clark, J., concurring)) bring into the process--so that the parties' discriminatory action becomes state action under the Fifteenth Amendment. *Allwright, supra*, at 664, 64 S.Ct. 757; see also *Terry*, 345 U.S., at 484, 73 S.Ct. 809 (Clark, J., concurring); *id.*, at 469, 73 S.Ct. 809 (opinion of Black, J.). They do not stand for the proposition that party affairs are public affairs, free of First Amendment protections--and our later holdings make that entirely clear. [FN5] See, *e.g., Tashjian, supra.*

FN4. On this point, the dissent shares respondents' view, at least where the selection process is a state-run election. The right not to associate, it says, "is simply inapplicable to participation in a state election." "[A]n election, unlike a convention or caucus, is a public affair." *Post*, at 2419 (opinion of STEVENS, J.). Of course it is, but when the election determines a party's nominee it is a party affair as well, and, as the cases to be discussed in text demonstrate, the constitutional rights of those composing the party cannot be disregarded.

FN5. The dissent is therefore wrong to conclude that *Allwright* and *Terry* demonstrate that "[t]he protections that the First Amendment affords to the internal processes of a political party do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election." *Post*, at 2419 (internal quotation marks and citation omitted). Those cases simply prevent exclusion that violates some independent constitutional proscription. The closest the dissent comes to identifying such a proscription in this case is its reference to "the First Amendment associational interests" of citizens to participate in the primary of a party to which they do not belong, and the "fundamental right" of

> citizens "to cast a meaningful vote for the candidate of their choice." *Post,* at 2422. As to the latter: Selecting a candidate is quite different from voting for the candidate of one's choice. If the "fundamental right" to cast a meaningful vote were really at issue in this context, Proposition 198 would be not only constitutionally permissible but constitutionally required, which no one believes. As for the associational "interest" in selecting the candidate of a group to which one does not belong, that falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest. It has been described in our cases as a "desire"--and rejected as a basis for disregarding the First Amendment right to exclude. See *infra,* at 2413.

****2408 *574** Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself. See Cunningham, The Jeffersonian Republican Party, in 1 History of U.S. Political Parties 239, 241 (A. Schlesinger ed. 1973). Consistent with this tradition, the Court has recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs," *Tashjian, supra,* at 214-215, 107 S.Ct. 544, which "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only," *La Follette,* 450 U.S., at 122, 101 S.Ct. 1010. That is to say, a corollary of the right to associate is the right not to associate. " 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.' " ***575***Id.,* at 122, n. 22, 101 S.Ct. 1010 (quoting L. Tribe, American Constitutional Law 791 (1978)). See also *Roberts v. United States Jaycees,* 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views. See *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 372, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (STEVENS, J., dissenting) ("But a party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support"). Some political parties--such as President Theodore Roosevelt's Bull Moose Party, the La Follette Progressives of 1924, the Henry Wallace Progressives of 1948, and the George Wallace American Independent Party of 1968--are virtually inseparable from their nominees (and tend not to outlast them). See generally E. Kruschke, Encyclopedia of Third Parties in the United States (1991).

Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences." *Eu, supra,* at 224, 109 S.Ct. 1013 (internal quotation marks omitted). The moment of choosing the party's nominee, we have said, is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian,* 479 U.S., at 216, 107 S.Ct. 544; see also *id.,* at 235-236, 107 S.Ct. 544 (SCALIA, J., dissenting) ("The ability of the members of the Republican Party to select their own candidate ... unquestionably implicates an associational freedom"); *Timmons,* 520 U.S., at 359, 117 S.Ct. 1364 ("[T]he New Party, and not someone ***576** else, has the right to select the ****2409** New Party's standard bearer" (internal quotation marks omitted)); *id.,* at 371, 117 S.Ct. 1364 (STEVENS, J., dissenting) ("The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office").

In *La Follette,* the State of Wisconsin conducted an open presidential preference primary. [FN6]

Although the voters did not select the delegates to the Democratic Party's National Convention directly--they were chosen later at caucuses of party members--Wisconsin law required these delegates to vote in accord with the primary results. Thus allowing nonparty members to participate in the selection of the party's nominee conflicted with the Democratic Party's rules. We held that, whatever the strength of the state interests supporting the open primary itself, they could not justify this "substantial intrusion into the associational freedom of members of the National Party." [FN7] 450 U.S., at 126, 101 S.Ct. 1010.

FN6. An open primary differs from a blanket primary in that, although as in the blanket primary any person, regardless of party affiliation, may vote for a party's nominee, his choice is limited to that party's nominees *for all offices*. He may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general.

FN7. The dissent, in attempting to fashion its new rule--that the right not to associate does not exist with respect to primary elections, see *post,* at 2418-2419--rewrites *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981) , to stand merely for the proposition that a political party has a First Amendment right to "defin[e] the organization and composition of its governing units," *post,* at 2417. In fact, however, the state-imposed burden at issue in *La Follette* was the " 'intrusion by those with adverse political principles' " upon the selection of the party's nominee (in that case its presidential nominee). 450 U.S., at 122, 101 S.Ct. 1010 (quoting *Ray v. Blair,* 343 U.S. 214, 221-222, 72 S.Ct. 654, 96 L.Ed. 894 (1952)). See also 450 U.S., at 125, 101 S.Ct. 1010 (comparing asserted state interests with burden created by the "imposition of voting requirements upon" delegates). Of course *La Follette* involved the burden a state regulation imposed on a national party, but that factor affected only the weight of the State's interest, and had no bearing upon the existence *vel non* of a party's First Amendment right to exclude. *Id.,* at 121-122, 125-126, 101 S.Ct. 1010. Although Justice STEVENS now considers this interpretation of *La Follette* "specious," see *post,* at 2418, n. 3, he once subscribed to it himself. His dissent from the order dismissing the appeals in *Bellotti v. Connolly,* 460 U.S. 1057, 103 S.Ct. 1510, 75 L.Ed.2d 938 (1983), described *La Follette* thusly: "There this Court rejected Wisconsin's requirement that delegates to the party's Presidential nominating convention, selected in a primary open to nonparty voters, must cast their convention votes in accordance with the primary election results. In our view, the interests advanced by the State ... did not justify its substantial intrusion into the associational freedom of members of the National Party .... Wisconsin *required* convention delegates to cast their votes for candidates who might have drawn their support from nonparty members. The results of the party's decisionmaking process might thereby have been distorted." 460 U.S., at 1062-1063, 103 S.Ct. 1510 (emphasis in original).
Not only does the dissent's principle of no right to exclude conflict with our precedents, but it also leads to nonsensical results. In *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), we held that the First Amendment protects a party's right to invite independents to participate in the primary. Combining *Tashjian* with the dissent's rule affirms a party's constitutional right to allow outsiders to select its candidates, but denies a party's constitutional right to reserve candidate selection to its own members. The First Amendment would thus guarantee a party's right to lose its identity, but not to preserve it.

[3] *577 California's blanket primary violates the principles set forth in these cases. Proposition 198

forces political parties to associate with-- to have their nominees, and hence their positions, determined by--those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival. In this respect, it is qualitatively different from a closed primary. Under that system, even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to "cross over," at least he must formally *become a* ***2410** *member of the party;* and once he does so, he is limited to voting for candidates of that party. [FN8]

> FN8. In this sense, the blanket primary also may be constitutionally distinct from the open primary, see n. 6, *supra,* in which the voter is limited to one party's ballot. See *La Follette, supra,* at 130, n. 2, 101 S.Ct. 1010 (Powell, J., dissenting) ("[T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party .... The situation might be different in those States with 'blanket' primaries--*i.e.,* those where voters are allowed to participate in the primaries of more than one party on a single occasion, selecting the primary they wish to vote in with respect to each individual elective office"). This case does not require us to determine the constitutionality of open primaries.

***578** The evidence in this case demonstrates that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party is far from remote--indeed, it is a clear and present danger. For example, in one 1997 survey of California voters 37 percent of Republicans said that they planned to vote in the 1998 Democratic gubernatorial primary, and 20 percent of Democrats said they planned to vote in the 1998 Republican United States Senate primary. Tr. 668-669. Those figures are comparable to the results of studies in other States with blanket primaries. One expert testified, for example, that in Washington the number of voters crossing over from one party to another can rise to as high as 25 percent, *id.,* at 511, and another that only 25 to 33 percent of all Washington voters limit themselves to candidates of one party throughout the ballot, App. 136. The impact of voting by nonparty members is much greater upon minor parties, such as the Libertarian Party and the Peace and Freedom Party. In the first primaries these parties conducted following California's implementation of Proposition 198, the total votes cast for party candidates in some races was more than *double* the total number of *registered party members.* California Secretary of State, Statement of Vote, Primary Election, June 2, 1998, http://primary98.ss.ca.gov/Final/Official_Results.htm; California Secretary of State, Report of Registration, May 1998,http://www.ss.ca.gov/elections/elections_u.htm.

The record also supports the obvious proposition that these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful. The 1997 survey of California voters revealed significantly different policy preferences between party members and primary voters who "crossed over" from another party. Pl. Exh. 8 ***579** Addendum to Mervin Field Report). One expert went so far as to describe it as "inevitable [under Proposition 198] that parties will be forced in some circumstances to give their official designation to a candidate who's not preferred by a majority or even plurality of party members." Tr. 421 (expert testimony of Bruce Cain).

In concluding that the burden Proposition 198 imposes on petitioners' rights of association is not severe, the Ninth Circuit cited testimony that the prospect of malicious crossover voting, or raiding, is slight, and that even though the numbers of "benevolent" crossover voters were significant, they would be determinative in only a small number of races. [FN9] 169 F.3d, at 656-657. But a single election in which the party nominee is selected by nonparty members could be enough to destroy the party. In the 1860 Presidential election, if opponents of the fledgling Republican Party had been able to cause its nomination of a proslavery candidate in place of Abraham Lincoln, the coalition of intraparty factions forming behind him likely would have disintegrated, endangering the party's ***2411** survival and thwarting its effort to

fill the vacuum left by the dissolution of the Whigs. See generally 1 Political Parties & Elections in the United States: An Encyclopedia 398-408, 587 (L. Maisel ed. 1991). Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it. "[R]egulating the identity of the parties' leaders," we have said, "may ... color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Eu,* 489 U.S., at 231, n. 21, 109 S.Ct. 1013.

> FN9. The Ninth Circuit defined a crossover voter as one "who votes for a candidate of a party in which the voter is not registered. Thus, the cross-over voter could be an independent voter or one who is registered to a competing political party." 169 F.3d 646, 656 (1999).

In any event, the deleterious effects of Proposition 198 are not limited to altering the identity of the nominee. Even ***580** when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions--and, should he be elected, will continue to take somewhat different positions in order to be *re*nominated. As respondents' own expert concluded: "The policy positions of Members of Congress elected from blanket primary states are ... more moderate, both in an absolute sense and relative to the other party, and so are more reflective of the preferences of the mass of voters at the center of the ideological spectrum." App. 109 (expert report of Elisabeth R. Gerber). It is unnecessary to cumulate evidence of this phenomenon, since, after all, the whole *purpose* of Proposition 198 was to favor nominees with "moderate" positions. *Id.,* at 89. It encourages candidates--and officeholders who hope to be renominated--to curry favor with persons whose views are more "centrist" than those of the party base. In effect, Proposition 198 has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the "basic function" of choosing their own leaders. *Kusper,* 414 U.S., at 58, 94 S.Ct. 303.

Nor can we accept the Court of Appeals' contention that the burden imposed by Proposition 198 is minor because petitioners are free to endorse and financially support the candidate of their choice in the primary. 169 F.3d, at 659. The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee. In *Eu,* we recognized that party-leadership endorsements are not always effective--for instance, in New York's 1982 gubernatorial primary, Edward Koch, the Democratic Party leadership's choice, lost out to Mario Cuomo. 489 U.S., at 228, n. 18, 109 S.Ct. 1013. One study has concluded, moreover, that even when the leadership-endorsed candidate has won, the effect of the endorsement has been negligible. *Ibid.* (citing App. in *Eu v. San Francisco County Democratic Central Comm.,* O.T.1988, No. 87-1269, pp. 97- 98). New York's was a closed primary; one ***581** would expect leadership endorsement to be even less effective in a blanket primary, where many of the voters are unconnected not only to the party leadership but even to the party itself. In any event, the ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders.

We are similarly unconvinced by respondents' claim that the burden is not severe because Proposition 198 does not limit the parties from engaging fully in *other* traditional party behavior, such as ensuring orderly internal party governance, maintaining party discipline in the legislature, and conducting campaigns. The accuracy of this assertion is highly questionable, at least as to the first two activities. That party nominees will be equally observant of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful seems to us improbable. Respondents themselves suggest as much when they assert that the blanket primary system " 'will lead to the election of more representative "problem solvers" *who are less beholden to* ****2412** *party officials.*' " Brief for Respondents 41 (emphasis added) (quoting 169 F.3d, at 661). In the end, however, the effect of Proposition 198 on these other activities is beside the point. We have consistently refused to overlook an unconstitutional

restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired. See, *e.g., Spence v. Washington,* 418 U.S. 405, 411, n. 4, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) *(per curiam); Kusper,* 414 U.S., at 58, 94 S.Ct. 303. There is simply no substitute for a party's selecting its own candidates.

In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process--the "basic function of a political party," *ibid.*--by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome--indeed, in this case the *intended* outcome--***582** of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest. See *Timmons,* 520 U.S., at 358, 117 S.Ct. 1364 ("Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest"). It is to that question which we now turn.

III

[4] Respondents proffer seven state interests they claim are compelling. Two of them--producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns--are simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices. Indeed, respondents admit as much. For instance, in substantiating their interest in "representativeness," respondents point to the fact that "officials elected under blanket primaries stand closer to the median policy positions of their districts" than do those selected only by party members. Brief for Respondents 40. And in explaining their desire to increase debate, respondents claim that a blanket primary forces parties to reconsider long standing positions since it "compels [their] candidates to appeal to a larger segment of the electorate." *Id.,* at 46. Both of these supposed interests, therefore, reduce to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority.

We have recognized the inadmissibility of this sort of "interest" before. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), the South Boston Allied War Veterans Council refused to allow an organization of openly gay, lesbian, and bisexual persons (GLIB) to participate in the council's annual ***583** St. Patrick's Day parade. GLIB sued the council under Massachusetts' public accommodation law, claiming that the council impermissibly denied them access on account of their sexual orientation. After noting that parades are expressive endeavors, we rejected GLIB's contention that Massachusetts' public accommodation law overrode the council's right to choose the content of its own message. Applying the law in such circumstances, we held, made apparent that its "object [was] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. ... [I]n the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Id.,* at 578, 115 S.Ct. 2338.

[5] Respondents' third asserted compelling interest is that the blanket primary is the only way to ensure that disenfranchised persons enjoy the right to an effective vote. By "disenfranchised," respondents do not mean those who cannot vote; ****2413** they mean simply independents and members of the minority party in "safe" districts. These persons are disenfranchised, according to respondents, because under a closed primary they are unable to participate in what amounts to the determinative election--the majority party's primary; the only way to ensure they have an "effective" vote is to force the party to open its primary to them. This also appears to be nothing more than reformulation of an asserted state interest we have already rejected--recharacterizing nonparty members' keen desire to participate in selection of the party's nominee as "disenfranchisement" if that desire is not fulfilled. We have said, however, that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications."

Tashjian, 479 U.S., at 215- 216, n. 6, 107 S.Ct. 544 (citing *Rosario v. Rockefeller,* 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), and *Nader v. Schaffer,* 417 F.Supp. 837 (D.Conn.), summarily aff'd, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976)). The voter's desire to ***584** participate does not become more weighty simply because the State supports it. Moreover, even if it were accurate to describe the plight of the non-party-member in a safe district as "disenfranchisement," Proposition 198 is not needed to solve the problem. The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs.

[6] Respondents' remaining four asserted state interests--promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy--are not, like the others, automatically out of the running; but neither are they, *in the circumstances of this case,* compelling. That determination is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant. And for all four of these asserted interests, we find it not to be.

The aspect of fairness addressed by Proposition 198 is presumably the supposed inequity of not permitting nonparty members in "safe" districts to determine the party nominee. If that is unfair at all (rather than merely a consequence of the eminently democratic principle that--except where constitutional imperatives intervene--the majority rules), it seems to us less unfair than permitting nonparty members to hijack the party. As for affording voters greater choice, it is obvious that the net effect of this scheme-- indeed, its avowed purpose--is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." This may well be described as broadening the range of choices *favored by the majority*--but that is hardly a compelling state interest, if indeed it is even a legitimate one. The interest in increasing voter participation is just a variation on the same theme (more choices favored by the majority will ***585** produce more voters), and suffers from the same defect. As for the protection of privacy: The specific privacy interest at issue is not the confidentiality of medical records or personal finances, but confidentiality of one's party affiliation. Even if (as seems unlikely) a scheme for administering a closed primary could not be devised in which the voter's declaration of party affiliation would not be public information, we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a "compelling" one. If such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices. See, *e.g.,* 47 U.S.C. § 154(b)(5) ("[M]aximum number of commissioners [of ****2414** the Federal Communications Commission] who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission"); 47 U.S.C. § 396(c)(1) (1994 ed., Supp. III) (no more than five members of Board of Directors of Corporation for Public Broadcasting may be of same party); 42 U.S.C. § 2000e-4(a) (no more than three members of Equal Employment Opportunity Commission may be of same party).

Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot--which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the ***586** constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"-- all without

severely burdening a political party's First Amendment right of association.

* * *

Respondents' legitimate state interests and petitioners' First Amendment rights are not inherently incompatible. To the extent they are in this case, the State of California has made them so by forcing political parties to associate with those who do not share their beliefs. And it has done this at the "crucial juncture" at which party members traditionally find their collective voice and select their spokesman. *Tashjian,* 479 U.S., at 216, 107 S.Ct. 544. The burden Proposition 198 places on petitioners' rights of political association is both severe and unnecessary. The judgment for the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

Justice KENNEDY, concurring.

Proposition 198, the product of a statewide popular initiative, is a strong and recent expression of the will of California's electorate. It is designed, in part, to further the object of widening the base of voter participation in California elections. Until a few weeks or even days before an election, many voters pay little attention to campaigns and even less to the details of party politics. Fewer still participate in the direction and control of party affairs, for most voters consider the internal dynamics of party organization remote, partisan, and of slight interest. Under these conditions voters tend to become disinterested, and so they refrain from voting altogether. To correct this, California seeks to make primary voting more responsive to the views and preferences of the electorate as a whole. The results of California's blanket primary system may demonstrate the efficacy ***587** of its solution, for there appears to have been a substantial increase in voter interest and voter participation. See Brief for Respondents 45-46.

Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process. In short, there is much to be said in favor of California's law; and I might find this to be a close case if it were simply a way to make elections more fair and open or addressed matters purely of party structure.

The true purpose of this law, however, is to force a political party to accept a candidate it may not want and, by so doing, to ****2415** change the party's doctrinal position on major issues. *Ante,* at 2411-2412. From the outset the State has been fair and candid to admit that doctrinal change is the intended operation and effect of its law. See, *e.g.,* Brief for Respondents 40, 46. It may be that organized parties, controlled--in fact or perception--by activists seeking to promote their self-interest rather than enhance the party's long-term support, are shortsighted and insensitive to the views of even their own members. A political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal. Under the First Amendment's guarantee of speech through free association, however, this is an issue for the party to resolve, not for the State. Political parties advance a shared political belief, but to do so they often must speak through their candidates. When the State seeks to direct changes in a political party's philosophy by forcing upon it unwanted candidates and wresting the choice between moderation and partisanship away from the party itself, the State's incursion on the party's associational freedom is subject to careful scrutiny under the First Amendment. For these reasons I agree with the Court's opinion.

I add this separate concurrence to say that Proposition 198 is doubtful for a further reason. In justification of its statute ***588** California tells us a political party has the means at hand to protect its associational freedoms. The party, California contends, can simply use its funds and resources to support the candidate of its choice, thus defending its doctrinal positions by advising the voters of its own preference. To begin with, this does not meet the parties' First Amendment objection, as the Court well explains. *Ante,* at 2411-2412. The important additional point, however, is that, by reason of the Court's denial of First Amendment protections to a political party's spending of its own funds and resources in cooperation with its preferred candidate, see *Colorado Republican Federal*

Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996), the Federal Government or the State has the power to prevent the party from using the very remedy California now offers up to defend its law.

Federal campaign finance laws place strict limits on the manner and amount of speech parties may undertake in aid of candidates. Of particular relevance are limits on coordinated party expenditures, which the Federal Election Campaign Act of 1971 deems to be contributions subject to specific monetary restrictions. See 90 Stat. 488, 2 U.S.C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate"). Though we invalidated limits on independent party expenditures in *Colorado Republican,* the principal opinion did not question federal limits placed on coordinated expenditures. See 518 U.S., at 624-625, 116 S.Ct. 2309 (opinion of BREYER, J.). Two Justices in dissent said that "all money spent by a political party to secure the election of its candidate" would constitute coordinated expenditures and would have upheld the statute as applied in that case. See *id.,* at 648, 116 S.Ct. 2309 (opinion of STEVENS, J.). Thus, five Justices of the Court subscribe to the position that Congress or a State may limit the amount a political party spends in direct collaboration with its preferred candidate for elected office.

***589** In my view, as stated in both *Colorado Republican, supra,* at 626, 116 S.Ct. 2309 (opinion concurring in judgment and dissenting in part), and in *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 405-406, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (dissenting opinion), these recent cases deprive political parties of their First Amendment rights. Our constitutional tradition is one in which political parties and their candidates make common cause in the exercise of political speech, which is ****2416** subject to First Amendment protection. There is a practical identity of interests between parties and their candidates during an election. Our unfortunate decisions remit the political party to use of indirect or covert speech to support its preferred candidate, hardly a result consistent with free thought and expression. It is a perversion of the First Amendment to force a political party to warp honest, straightforward speech, exemplified by its vigorous and open support of its favored candidate, into the covert speech of soft money and issue advocacy so that it may escape burdensome spending restrictions. In a regime where campaign spending cannot otherwise be limited--the structure this Court created on its own in *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)*--restricting the amounts a political party may spend in collaboration with its own candidate is a violation of the political party's First Amendment rights.

Were the views of those who would uphold both California's blanket primary system and limitations on coordinated party expenditures to become prevailing law, the State could control political parties at two vital points in the election process. First, it could mandate a blanket primary to weaken the party's ability to defend and maintain its doctrinal positions by allowing nonparty members to vote in the primary. Second, it could impose severe restrictions on the amount of funds and resources the party could spend in efforts to counteract the State's doctrinal intervention. In other words, the First Amendment injury done by the Court's ruling in *Colorado Republican* would be compounded were California to prevail in the instant case.

***590** When the State seeks to regulate a political party's nomination process as a means to shape and control political doctrine and the scope of political choice, the First Amendment gives substantial protection to the party from the manipulation. In a free society the State is directed by political doctrine, not the other way around. With these observations, I join the opinion of the Court.

Justice STEVENS, with whom Justice GINSBURG joins as to Part I, dissenting.

Today the Court construes the First Amendment as a limitation on a State's power to broaden voter participation in elections conducted by the State. The Court's holding is novel and, in my judgment, plainly wrong. I am convinced that California's adoption of a blanket primary pursuant to

Proposition 198 does not violate the First Amendment, and that its use in primary elections for state offices is therefore valid. The application of Proposition 198 to elections for United States Senators and Representatives, however, raises a more difficult question under the Elections Clause of the United States Constitution, Art. I, § 4, cl. 1. I shall first explain my disagreement with the Court's resolution of the First Amendment issue and then comment on the Elections Clause issue.

I

A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty. This case is about the State of California's power to decide who may vote in an election conducted, and paid for, by the State. [FN1] The ****2417** United States Constitution imposes constraints ***591** on the States' power to limit access to the polls, but we have never before held or suggested that it imposes any constraints on States' power to authorize additional citizens to participate in any state election for a state office. In my view, principles of federalism require us to respect the policy choice made by the State's voters in approving Proposition 198.

FN1. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (observing that the United States Constitution grants States a broad power to prescribe the manner of elections for certain federal offices, which power is matched by state control over the election process for state offices). In California, the Secretary of State administers the provisions of the State Elections Code and has some supervisory authority over county election officers. Cal. Govt.Code Ann. § 12172.5 (West 1992 and Supp.2000). Primary and other elections are administered and paid for primarily by county governments. Cal. Elec.Code Ann. §§ 13000-13001 (West 1996 and Supp.2000). Anecdotal evidence suggests that each statewide election in California (whether primary or general) costs governmental units between $45 million and $50 million.

The blanket primary system instituted by Proposition 198 does not abridge "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Ante*, at 2408. [FN2] The Court's contrary conclusion rests on the premise that a political party's freedom of expressive association includes a "right not to associate," which in turn includes a right to exclude voters unaffiliated with the party from participating in the selection of that party's nominee in a primary election. *Ante*, at 2408. In drawing this conclusion, however, the Court blurs two distinctions that are critical: (1) the distinction between ***592** a private organization's right to define itself and its messages, on the one hand, and the State's right to define the obligations of citizens and organizations performing public functions, on the other; and (2) the distinction between laws that abridge participation in the political process and those that encourage such participation.

FN2. Prominent members of the founding generation would have disagreed with the Court's suggestion that representative democracy is "unimaginable" without political parties, *ante*, at 2408, though their antiparty thought ultimately proved to be inconsistent with their partisan actions. See, *e.g.*, R. Hofstadter, The Idea of a Party System 2-3 (1969) (noting that "the creators of the first American party system on both sides, Federalists and Republicans, were men who looked upon parties as sores on the body politic"). At best, some members of that generation viewed parties as an unavoidable product of a free state that were an evil to be endured, though most viewed them as an evil to be abolished or suppressed. *Id.*, at 16-17, 24. Indeed, parties ranked high on the list of evils that the Constitution was designed to check. *Id.*, at 53; see The Federalist No. 10 (J. Madison).

When a political party defines the organization and composition of its governing units, when it decides what candidates to endorse, and when it decides whether and how to communicate those endorsements to the public, it is engaged in the kind of private expressive associational activity that the

First Amendment protects. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 354-355, n. 4, 359, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (recognizing party's right to select its own standard-bearer in context of minor party that selected its candidate through means other than a primary); *id.,* at 371, 117 S.Ct. 1364 (STEVENS, J., dissenting); *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989); *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 124, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981) ("A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution"); *Cousins v. Wigoda,* 419 U.S. 477, 491, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975) ("*Illinois*' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the *National* Party Convention" (emphasis added)). [FN3] A political ***593 **2418** party could, if a majority of its members chose to do so, adopt a platform advocating white supremacy and opposing the election of any non-Caucasians. Indeed, it could decide to use its funds and oratorical skills to support only those candidates who were loyal to its racist views. Moreover, if a State permitted its political parties to select their candidates through conventions or caucuses, a racist party would also be free to select only candidates who would adhere to the party line.

> FN3. The Court's disagreement with this interpretation of *La Follette* is specious. *Ante,* at 2409, n. 7 (claiming that state-imposed burden actually at issue in *La Follette* was intrusion of those with adverse political principles into party's primary) A more accurate characterization of the nature of *La Follette's* reasoning is provided by Justice Powell: "In analyzing the burden imposed on associational freedoms in this case, the Court treats the Wisconsin law as the equivalent of one regulating delegate selection, and, relying on *Cousins v. Wigoda,* 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975), concludes that any interference with the National Party's accepted delegate-selection procedures impinges on constitutionally protected rights." *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 128, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981) (dissenting opinion). Indeed, the *La Follette* Court went out of its way to characterize the Wisconsin law in this manner in order to avoid casting doubt on the constitutionality of open primaries. *Id.,* at 121, 101 S.Ct. 1010 (majority opinion) (noting that the issue was not whether an open primary was constitutional but "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party"). The fact that the *La Follette* Court also characterizes the Wisconsin law at one point as a law "impos[ing] ... voting requirements" on delegates, *id.,* at 125, 101 S.Ct. 1010, does not alter the conclusion that *La Follette* is a case about state regulation of internal party processes, not about regulation of primary elections.
> State-mandated intrusion upon either delegate selection or delegate voting would surely implicate the affected party's First Amendment right to define the organization and composition of its governing units, but it is clear that California intrudes upon neither in this case. *Ante,* at 2406, n. 2.
> *La Follette* and *Cousins* also stand for the proposition that a State's interest in regulating at the *national* level the types of party activities mentioned in the text is outweighed by the burden that state regulation would impose on the parties' associational rights. See *Bellotti v. Connolly,* 460 U.S. 1057, 1062-1063, and n. 3, 103 S.Ct. 1510, 75 L.Ed.2d 938 (1983) (STEVENS, J., dissenting) (quoted in part *ante,* at 2409, n. 7). In this case, however, California does not seek to regulate such activities at all, much less to do so at the national level.

As District Judge Levi correctly observed in an opinion adopted by the Ninth Circuit, however, the

associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations. 169 F.3d 646, 654-655 (1999); cf. *Timmons,* 520 U.S., at 360, 117 S.Ct. 1364 (concluding that while regulation of endorsements implicates political parties' internal affairs and core associational activities, ***594** regulation of access to election ballot does not); *La Follette,* 450 U.S., at 120-121, 101 S.Ct. 1010 (noting that it "may well be correct" to conclude that party associational rights are not unconstitutionally infringed by state open primary); *id.,* at 131-132, 101 S.Ct. 1010 (Powell, J., dissenting) (concluding that associational rights of major political parties are limited by parties' lack of defined ideological orientation and political mission). I think it clear--though the point has never been decided by this Court--"that a State may require parties to use the primary format for selecting their nominees." *Ante,* at 2407. The reason a State may impose this significant restriction on a party's associational freedoms is that both the general election and the primary are quintessential forms of state action. [FN4] It is because the primary is state action that an organization-- whether it calls itself a political party or just a "Jaybird" association--may not deny non-Caucasians the right to participate in the selection of its nominees. *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); *Smith v. Allwright,* 321 U.S. 649, 663-664, 64 S.Ct. 757, 88 L.Ed. 987 (1944). The Court is quite right in stating that those cases "do not stand for the proposition that party affairs are *[wholly]* public affairs, free of First Amendment protections." *Ante,* at 2407. They do, however, ****2419** stand for the proposition that primary elections, unlike most "party affairs," are state action. [FN5] The protections that the First ***595** Amendment affords to the "internal processes" of a political party, *ibid.,* do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election.

> FN4. Indeed, the primary serves an essential public function given that, "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the major political parties] have been made." *Morse v. Republican Party of Va.,* 517 U.S. 186, 205-206, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (opinion of STEVENS, J.) (internal quotation marks omitted); see also *United States v. Classic,* 313 U.S. 299, 319, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941).
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> FN5. Contrary to what the Court seems to think, I do not rely on *Terry* and *Allwright* as the basis for an argument that state accommodation of the parties' desire to exclude nonmembers from primaries would necessarily violate an independent constitutional proscription such as the Equal Protection Clause (though I do not rule that out). Cf. *ante,* at 2407-2408, n. 5. Rather, I cite them because our recognition that constitutional proscriptions apply to primaries illustrates that primaries--as integral parts of the election process by which the people select their government--are state affairs, not internal party affairs.

The so-called "right not to associate" that the Court relies upon, then, is simply inapplicable to participation in a state election. A political party, like any other association, may refuse to allow nonmembers to participate in the party's decisions when it is conducting its own affairs; [FN6] California's blanket primary system does not infringe this principle. *Ante,* at 2406, n. 2. But an election, unlike a convention or caucus, is a public affair. Although it is true that we have extended First Amendment protection to a party's right to invite independents to participate in its primaries, *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), neither that case nor any other has held or suggested that the "right not to associate" imposes a limit on the State's power to open up its primary elections to all voters eligible to vote in a general election. In my view, while state rules abridging participation in its elections should be closely scrutinized, [FN7] the First Amendment does not inhibit the State from acting to broaden voter access to state-run, state-financed elections. When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic ***596** process, it is acting not as a foe of

the First Amendment but as a friend and ally.

> FN6. "The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. But all those interests go to the conduct of the Presidential preference primary--not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates." *La Follette,* 450 U.S., at 124-125, 101 S.Ct. 1010.
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> FN7. See *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 370, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (STEVENS, J., dissenting) (general election ballot access restriction); *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (primary election ballot access restriction).

Although I would not endorse it, I could at least understand a constitutional rule that protected a party's associational rights by allowing it to refuse to select its candidates through state-regulated primary elections. See *Marchioro v. Chaney,* 442 U.S. 191, 199, 99 S.Ct. 2243, 60 L.Ed.2d 816 (1979) ("There can be no complaint that [a] party's [First Amendment] right to govern itself has been substantially burdened by [state regulation] when the source of the complaint is the party's own decision to confer critical authority on the [party governing unit being regulated]"); cf. *Tashjian,* 479 U.S., at 237, 107 S.Ct. 544 (SCALIA, J., dissenting) ("It is beyond my understanding why the Republican Party's delegation of its democratic choice [of candidates] to a Republican Convention [rather than a primary] can be proscribed [by the State], but its delegation of that choice to nonmembers of the Party cannot"). A meaningful "right not to associate," if there is such a right in the context of limiting an electorate, ought to enable a party to insist on choosing its nominees at a convention or caucus where nonmembers could be excluded. In the real world, however, anyone can "join" a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by ****2420** registering within a state-defined reasonable period of time before an election; neither past voting history nor the voter's race, religion, or gender can provide a basis for the party's refusal to "associate" with an unwelcome new member. See 169 F.3d, at 655, and n. 20. There is an obvious mismatch between a supposed constitutional right "not to associate" and a rule that turns on nothing more than the state-defined timing of the new associate's application for membership. See *La Follette,* 450 U.S., at 133, 101 S.Ct. 1010 (Powell, J., dissenting) ("As Party affiliation becomes ... easy for a voter to change [shortly before a particular primary election] in order to participate in [that] election, the difference between open and closed primaries loses its practical significance").

***597** The Court's reliance on a political party's "right not to associate" as a basis for limiting a State's power to conduct primary elections will inevitably require it either to draw unprincipled distinctions among various primary configurations or to alter voting practices throughout the Nation in fundamental ways. Assuming that a registered Democrat or independent who wants to vote in the Republican gubernatorial primary can do so merely by asking for a Republican ballot, the Republican Party's constitutional right "not to associate" is pretty feeble if the only cost it imposes on that Democrat or independent is a loss of his right to vote for non-Republican candidates for other offices. Cf. *ante,* at 2410, n. 8. Subtle distinctions of this minor import are grist for state legislatures, but they demean the process of constitutional adjudication. Or, as Justice SCALIA put the matter in his dissenting opinion in *Tashjian:*

> "The ... voter who, while steadfastly refusing to register as a Republican, casts a vote in [a nonclosed] Republican primary, forms no more meaningful an 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use." 479 U.S., at 235, 107 S.Ct. 544.

It is noteworthy that the bylaws of each of the political parties that are petitioners in this case

unequivocally state that participation in partisan primary elections is to be limited to registered members of the party only. App. 7, 15, 16, 18. Under the Court's reasoning, it would seem to follow that conducting anything but a closed partisan primary in the face of such bylaws would necessarily burden the parties' " 'freedom to identify the people who constitute the association.' " *Ante,* at 2408. Given that open primaries are supported by essentially the same state interests that the Court disparages today and are not as "narrow" as nonpartisan primaries, ***598** *ante,* at 2412-2414, there is surely a danger that open primaries will fare no better against a First Amendment challenge than blanket primaries have.

By the District Court's count, 3 States presently have blanket primaries, while an additional 21 States have open primaries and 8 States have semiclosed primaries in which independents may participate. 169 F.3d, at 650. This Court's willingness to invalidate the primary schemes of 3 States and cast serious constitutional doubt on the schemes of 29 others at the parties' behest is, as the District Court rightly observed, "an extraordinary intrusion into the complex and changing election laws of the States [that] ... remove[s] from the American political system a method for candidate selection that many States consider beneficial and which in the uncertain future could take on new appeal and importance." *Id.,* at 654. [FN8]

> FN8. When coupled with our decision in *Tashjian* that a party may require a State to open up a closed primary, this intrusion has even broader implications. It is arguable that, under the Court's reasoning combined with *Tashjian,* the only nominating options open for the States to choose without party consent are: (1) not to have primary elections, or (2) to have what the Court calls a "nonpartisan primary"--a system presently used in Louisiana--in which candidates previously nominated by the various political parties and independent candidates compete. *Ante,* at 2414. These two options are the same in practice because the latter is not actually a "primary" in the common, partisan sense of that term at all. Rather, it is a general election with a runoff that has few of the benefits of democratizing the party nominating process that led the Court to declare the State's ability to require nomination by primary " 'too plain for argument.' " *Ante,* at 2407; see *Lightfoot v. Eu,* 964 F.2d 865, 872-873 (C.A.9 1992) (explaining state interest in requiring direct partisan primary).

****2421** In my view, the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections. It is not this Court's constitutional function to choose between the competing visions of what makes democracy work--party autonomy and discipline versus progressive inclusion of the entire electorate in ***599** the process of selecting their public officials--that are held by the litigants in this case. *O'Callaghan v. State,* 914 P.2d 1250, 1263 (Alaska 1996); see also *Tashjian,* 479 U.S., at 222-223, 107 S.Ct. 544; *Luther v. Borden,* 7 How. 1, 40-42, 12 L.Ed. 581 (1849). That choice belongs to the people. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 795, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995).

Even if the "right not to associate" did authorize the Court to review the State's policy choice, its evaluation of the competing interests at stake is seriously flawed. For example, the Court's conclusion that a blanket primary severely burdens the parties' associational interests in selecting their standard-bearers does not appear to be borne out by experience with blanket primaries in Alaska and Washington. See, *e.g.,* 169 F.3d, at 656- 659, and n. 23. Moreover, that conclusion rests substantially upon the Court's claim that "[t]he evidence [before the District Court]" disclosed a "clear and present danger" that a party's nominee may be determined by adherents of an opposing party. *Ante,* at 2410. This hyperbole is based upon the Court's liberal view of its appellate role, not upon the record and the District Court's factual findings. Following a bench trial and the receipt of expert witness reports, the District Court found that "there is little evidence that raiding [by members of an opposing party] will be a factor under the blanket primary. On this point there is almost unanimity among the political

scientists who were called as experts by the plaintiffs and defendants." 169 F.3d, at 656. While the Court is entitled to test this finding by making an independent examination of the record, the evidence it cites--including the results of the June 1998 primaries, *ante*, at 2410, which should not be considered because they are not in the record--does not come close to demonstrating that the District Court's factual finding is clearly erroneous. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 498-501, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

As to the Court's concern that benevolent crossover voting impinges on party associational interests, *ante*, at 2410, the ***600** District Court found that experience with a blanket primary in Washington and other evidence "suggest[ed] that there will be particular elections in which there will be a substantial amount of cross-over voting ... although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states." 169 F.3d, at 657. In my view, an empirically debatable assumption about the relative number and effect of likely crossover voters in a blanket primary, as opposed to an open primary or a nominally closed primary with only a brief preregistration requirement, is too thin a reed to support a credible First Amendment distinction. See ****2422***Tashjian*, 479 U.S., at 219, 107 S.Ct. 544 (rejecting State's interest in keeping primary closed to curtail benevolent crossover voting by independents given that independents could easily cross over even under closed primary by simply registering as party members).

On the other side of the balance, I would rank as "substantial, indeed compelling," just as the District Court did, California's interest in fostering democratic government by "[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in [electoral processes]." 169 F.3d, at 662; [FN9] cf. *Timmons*, 520 U.S., at 364, 117 S.Ct. 1364 ("[W]e [do not] require elaborate, empirical verification of the weightiness of the State's asserted justifications"). The Court's glib rejection of the ***601** State's interest in increasing voter participation, *ante*, at 2413, is particularly regrettable. In an era of dramatically declining voter participation, States should be free to experiment with reforms designed to make the democratic process more robust by involving the entire electorate in the process of selecting those who will serve as government officials. Opening the nominating process to all and encouraging voters to participate in any election that draws their interest is one obvious means of achieving this goal. See Brief for Respondents 46 (noting that study presented to District Court showed higher voter turnout levels in blanket primary States than in open or closed primary States); *ante*, at 2414 (KENNEDY, J., concurring). I would also give some weight to the First Amendment associational interests of nonmembers of a party seeking to participate in the primary process, [FN10] to the fundamental right of such nonmembers to cast a meaningful vote for the candidate of their choice, *Burdick v. Takushi*, 504 U.S. 428, 445, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (KENNEDY, J., dissenting), and to the preference of almost 60% of California voters--including a majority of registered Democrats and Republicans--for a blanket primary. 169 F.3d, at 649; see *Tashjian*, 479 U.S., at 236, 107 S.Ct. 544 (SCALIA, J., dissenting) (preferring information on whether majority of rank-and-file party members support a particular proposition than whether state party convention does so). In my view, a State is unquestionably entitled to rely on this combination of interests in deciding who may vote in a primary election conducted by the State. It is indeed strange to find that the First Amendment forecloses this decision.

> FN9. In his concurrence, Justice KENNEDY argues that the State has no valid interest in changing party doctrine through an open primary, and suggests that the State's assertion of this interest somehow irrevocably taints its blanket primary system. *Ante*, at 2414-2415. The *Timmons* balancing test relied upon by the Court, *ante*, at 2412, however, does not support that analysis. *Timmons* and our myriad other constitutional cases that weigh burdens against state interests merely ask whether *a* state interest justifies the burden that the State is imposing on a constitutional right; the fact that one of the

asserted state interests may not be valid or compelling under the circumstances does not end the analysis.

FN10. See *La Follette,* 450 U.S., at 135-136, 101 S.Ct. 1010 (Powell, J., dissenting); cf. *Tashjian,* 479 U.S., at 215-216, n. 6, 107 S.Ct. 544 (discussing cases such as *Rosario v. Rockefeller,* 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), in which nonmembers' associational interests were overborne by state interests that coincided with party interests); *Bellotti v. Connolly,* 460 U.S., at 1062, 103 S.Ct. 1510 (STEVENS, J., dissenting) (discussing associational rights of voters).

***602** II

The Elections Clause of the United States Constitution, Art. I, § 4, cl. 1, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof." (Emphasis added.) This broad constitutional grant of power to state legislatures is "matched by state control over the election process for state offices." *Tashjian,* 479 U.S., at 217, 107 S.Ct. 544. For the reasons given in Part I, *supra,* I believe it would be a proper exercise of these powers and would not violate the First Amendment for the California Legislature to ****2423** adopt a blanket primary system. This particular blanket primary system, however, was adopted by popular initiative. Although this distinction is not relevant with respect to elections for state offices, it is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives.

The California Constitution empowers the voters of the State to propose statutes and to adopt or reject them. Art. 2, § 8. If approved by a majority vote, such "initiative statutes" generally take effect immediately and may not be amended or repealed by the California Legislature unless the voters consent. Art. 2, § 10. The amendments to the California Election Code that changed the state primary from a closed system to the blanket system presently at issue were the result of the voters' March 1996 adoption of Proposition 198, an initiative statute.

The text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state "Legislature[s]." It could be argued that this reasoning does not apply in California, as the California Constitution further provides that "[t]he legislative power of this State is vested in the California ***603** Legislature ..., but the people reserve to themselves the powers of initiative and referendum." Art. 4, § 1. The vicissitudes of state nomenclature, however, do not necessarily control the meaning of the Federal Constitution. Moreover, the United States House of Representatives has determined in an analogous context that the Elections Clause's specific reference to "the Legislature" is not so broad as to encompass the general "legislative power of this State." [FN11] Under that view, California's classification of voter-approved initiatives as an exercise of legislative power would not render such initiatives the act of the California Legislature within the meaning of the Elections Clause. Arguably, therefore, California's blanket primary system for electing United States Senators and Representatives is invalid. Because the point was neither raised by the parties nor discussed by the courts below, I reserve judgment on it. I believe, however, that the importance of the point merits further attention.

FN11. *Baldwin v. Trowbridge,* 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866) ("[Under the Elections Clause,] power is conferred upon the *legislature.* But what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine,* as known in the political history of the country? The [C]ommittee [of Elections for the U.S. House of Representatives] have adopted the latter construction").

* * *

For the reasons stated in Part I of this opinion, as well as those stated more fully in the District Court's excellent opinion, I respectfully dissent.

530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502, 68 USLW 4604, 00 Cal. Daily Op. Serv. 5083, 2000 Daily Journal D.A.R. 6777, 2000 CJ C.A.R. 3867

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473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313, 53 USLW 5022
(Cite as: 473 U.S. 432, 105 S.Ct. 3249)

Briefs and Other Related Documents

Supreme Court of the United States

CITY OF CLEBURNE, TEXAS, et al., Petitioners
v.
CLEBURNE LIVING CENTER et al.

No. 84-468.

Argued March 18, 1985.
Reargued April 23, 1985.
Decided July 1, 1985.

Proposed operator of group home for the mentally retarded and others brought suit challenging validity of zoning ordinance excluding such group homes from permitted uses in zoning district in question. The United States District Court for the Northern District of Texas, Robert W. Porter, J., entered judgment denying relief, and an appeal was taken. The Court of Appeals for the Fifth Circuit, 726 F.2d 191, affirmed in part, and reversed and remanded in part. After rehearing was denied, 735 F.2d 832, certiorari was granted. The Supreme Court, Justice White, held that: (1) mental retardation is not a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded to economic and social legislation, but (2) requiring a special use permit for proposed group home for the mentally retarded violated equal protection clause in that requirement, in absence of any rational basis in record for believing that group home would pose any special threat to city's legitimate interests, appeared to rest on an irrational prejudice against mentally retarded.

Affirmed in part and vacated in part.

Justice Stevens filed a concurring opinion in which Chief Justice Burger joined.

Justice Marshall concurred in part, dissented in part, and filed an opinion in which Justices Brennan and Blackmun joined.

West Headnotes

[1] Constitutional Law ⚖211(1)
92k211(1) Most Cited Cases
(Formerly 92k211)
Equal protection clause's command that no state shall deny to any person within its jurisdiction the equal protection of the laws [U.S.C.A. Const.Amend. 14] is essentially a direction that all persons similarly situated should be treated alike.

[2] Constitutional Law ⚖48(4.1)
92k48(4.1) Most Cited Cases
(Formerly 92k48(4))
Generally, legislation that is challenged as denying equal protection is presumed to be valid and will be sustained if classification drawn by the legislation is rationally related to a legitimate state interest. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law ⚖212
92k212 Most Cited Cases
When social or economic legislation is at issue, equal protection clause [U.S.C.A. Const.Amend. 14] allows states wide latitude.

[4] Constitutional Law ⚖215
92k215 Most Cited Cases
Because statutory classification by race, alienage or national origin is so seldom relevant to achievement of any legitimate state interest and because such discrimination is unlikely to be soon rectified by legislative means, laws that so classify are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law ⚖48(4.1)
92k48(4.1) Most Cited Cases
(Formerly 92k48(4))
State laws which impinge on personal rights protected by the Constitution are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law ⚖224(1)
92k224(1) Most Cited Cases
Legislative classifications based on gender call for

a heightened standard of review and will fail when challenged as denying equal protection unless substantially related to a sufficiently important governmental interest. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law ⇐213.1(1)
92k213.1(1) Most Cited Cases
Legislative classifications based on illegitimacy are subject to somewhat heightened review on an equal protection challenge, and will survive equal protection scrutiny only to extent they are substantially related to legitimate state interest. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law ⇐213.1(2)
92k213.1(2) Most Cited Cases
Where individuals in group affected by a law have distinguishing characteristics relevant to interests state has authority to implement, equal protection clause [U.S.C.A. Const.Amend. 14] requires only a rational means to serve a legitimate end in order for law to survive an equal protection challenge.

[9] Constitutional Law ⇐213.1(1)
92k213.1(1) Most Cited Cases
Mental retardation is not a quasi-suspect classification calling for more exacting standard of judicial review than is normally accorded economic and social legislation in view of facts that states' interest in dealing with and providing for the mentally retarded is legitimate, distinctive legislative response, both national and state, to plight of the mentally retarded demonstrates not only that they have unique problems, but also that lawmakers have been addressing their difficulties in manner that belies continuing antipathy or prejudice and corresponding need for more intrusive oversight by judiciary, and that mentally retarded are not politically powerless, and, if mentally retarded were deemed quasi-suspect, it would be difficult to find principled way to distinguish other groups who have immutable disabilities setting them off from others, who cannot themselves mandate desired legislative responses, and who can claim some degree of prejudice from at least part of public at large. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law ⇐213.1(2)
92k213.1(2) Most Cited Cases
State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render distinction arbitrary or irrational. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law ⇐228.2
92k228.2 Most Cited Cases

[11] Zoning and Planning ⇐86
414k86 Most Cited Cases
Requiring a special use permit for proposed group home for the mentally retarded violated equal protection clause [U.S.C.A. Const.Amend. 14] in that requirement, in absence of any rational basis in record for believing that group home would pose any special threat to city's legitimate interests, appeared to rest on an irrational prejudice against mentally retarded.

[12] Constitutional Law ⇐213(1)
92k213(1) Most Cited Cases
Electorate as a whole, whether by referendum or otherwise, may not order city action violative of the equal protection clause [U.S.C.A. Const.Amend. 14]

[13] Constitutional Law ⇐213(1)
92k213(1) Most Cited Cases
A city may not avoid strictures of equal protection clause [U.S.C.A. Const.Amend. 14] by deferring to wishes or objections of some fraction of body politic.

***3250 *432 Syllabus** [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent Cleburne Living Center, Inc. (CLC), which anticipated leasing a certain building for the operation of a group home for the mentally retarded, was informed by petitioner city that a special use permit would be required, the city having concluded that the proposed group home should be classified as a "hospital for the feebleminded" under the zoning ordinance covering the area in which the proposed home would be located. Accordingly, CLC applied for a special use permit, but the City Council, after a public hearing, denied the permit. CLC and others (also respondents here) then filed suit against the city and a number of its officials, alleging that the zoning ordinance, on its face and as applied, violated the equal protection rights of CLC and its potential residents. The District Court held the ordinance and its application constitutional. The Court of Appeals reversed, holding that mental retardation is a "quasi-suspect" classification; that, under the

applicable "heightened-scrutiny" equal protection test, the ordinance was facially invalid because it did ****3251** not substantially further an important governmental purpose; and that the ordinance was also invalid as applied.

Held:

1. The Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. Pp. 3254-3258.

(a) Where individuals in a group affected by a statute have distinguishing characteristics relevant to interests a State has the authority to implement, the Equal Protection Clause requires only that the classification drawn by the statute be rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude. Pp. 3254-3255.

(b) Mentally retarded persons, who have a reduced ability to cope with and function in the everyday world, are thus different from other persons, and the States' interest in dealing with and providing for them ***433** is plainly a legitimate one. The distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary than is afforded under the normal equal protection standard. Moreover, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. The equal protection standard requiring that legislation be rationally related to a legitimate governmental purpose affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. Pp. 3255-3258.

2. Requiring a special use permit for the proposed group home here deprives respondents of the equal protection of the laws, and thus it is unnecessary to decide whether the ordinance's permit requirement is facially invalid where the mentally retarded are involved. Although the mentally retarded, as a group, are different from those who occupy other facilities--such as boarding houses and hospitals--that are permitted in the zoning area in question without a special permit, such difference is irrelevant unless the proposed group home would threaten the city's legitimate interests in a way that the permitted uses would not. The record does not reveal any rational basis for believing that the proposed group home would pose any special threat to the city's legitimate interests. Requiring the permit in this case appears to rest on an irrational prejudice against the mentally retarded, including those who would occupy the proposed group home and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law. Pp. 3258-3260.

726 F.2d 191 (CA5 1984), affirmed in part, vacated in part, and remanded.

***434** *Earl Luna* reargued the cause for petitioners. With him on the briefs were *Robert T. Miller, Jr.*, and *Mary Milford.*

Renea Hicks reargued the cause for respondents. With him on the brief were *Diane Shisk* and *Caryl Oberman.**

* *Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Solicitor General Fried, Deputy Assistant Attorney General Cooper,* and *Walter W. Barnett* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Connecticut et al. by *Joseph I. Lieberman,* Attorney General of Connecticut, *Elliot F. Gerson,* Deputy Attorney General, and *Henry S. Cohn,* Assistant Attorney General, *John Steven Clark,* Attorney General of Arkansas, *John K. Van de Kamp,* Attorney General of California, *Duane Woodard,* Attorney General of Colorado, *Neil F. Hartigan,* Attorney General of Illinois, *Jill Wine-Banks,* Solicitor General, and *Robert J. Connor,* Special Assistant Attorney General,

William J. Guste, Jr., Attorney General of Louisiana, and *Robert A. Barnett,* Assistant Attorney General, *Nicholas J. Spaeth,* Attorney General of North Dakota, *Arlene Violet,* Attorney General of Rhode Island, *W.J. Michael Cody,* Attorney General of Tennessee, and *Charles G. Brown,* Attorney General of West Virginia; for the State of Maryland by *Stephen H. Sachs,* Attorney General, *Dennis M. Sweeney,* Deputy Attorney General, and *Judith K. Sykes,* Assistant Attorney General; for the State of Pennsylvania et al. by *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Allen C. Warshaw,* Chief Deputy Attorney General, and *Andrew S. Gordon,* Senior Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Thomas J. Miller* of Iowa, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Stephen E. Merrill* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *Anthony J. Celebrezze, Jr.,* of Ohio, and *Bronson C. La Follette* of Wisconsin; for the State of Texas et al. by *Jim Mattox,* Attorney General of Texas, *David R. Richards, J. Patrick Wiseman,* and *James C. Todd* and *Philip Durst,* Assistant Attorneys General; for the American Association on Mental Deficiency et al. by *James W. Ellis, Ruth A. Luckasson, Stanley S. Herr,* and *Donald N. Bersoff;* for the American Civil Liberties Union Foundation et al. by *Burt Neuborne, Charles S. Sims, Robert M. Levy, Paul Hoffman, Stanley Fleishman, Joseph Lawrence, James Preis,* and *James C. Harrington;* for the Association for Retarded Citizens/USA et al. by *Thomas K. Gilhool, Frank J. Laski, Michael Churchill,* and *Timothy M. Cook;* for the Disability Rights Education and Defense Fund by *Arlene Brynne Mayerson;* for Disabled Peoples' International and Human Rights Advocates, Inc., by *Karen Parker;* and for the National Conference of Catholic Charities et al. by *Lewis Golinker, Herbert Semmel,* and *Kathleen E. Surgalla.*

Elliott W. Atkinson, Jr., filed a brief for the Federation of Greater Baton Rouge Civic Associations, Inc., as *amicus curiae.*

***435** Justice WHITE delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a "quasi-suspect" classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental ****3252** purpose. We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case.

I

In July 1980, respondent Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intention of leasing it to Cleburne Living Center, Inc. (CLC), [FN1] for the operation of a group home for the mentally retarded. It was anticipated that the home would house 13 retarded men and women, who would be under the constant supervision of CLC staff members. The house had four bedrooms and two baths, with a half bath to be added. CLC planned to comply with all applicable state and federal regulations. [FN2]

FN1. Cleburne Living Center, Inc., is now known as Community Living Concepts, Inc. Hannah is the vice president and part owner of CLC. For convenience, both Hannah and CLC will be referred to as "CLC." A third respondent is Advocacy, Inc., a nonprofit corporation that provides legal services to developmentally disabled persons.

FN2. It was anticipated that the home would be operated as a private Level I Intermediate Care Facility for the Mentally Retarded, or ICF-MR, under a program providing for joint federal-state reimbursement for residential services for mentally retarded clients. See 42 U.S.C. § 1396d(a)(15); Tex. Human Resources Code Ann. § 32.001 *et seq.* (1980 and Supp.1985). ICF-MR's are covered by extensive regulations and guidelines established by the United States Department of Health and Human Services and the Texas Departments of Human Resources, Mental Health and Mental

Retardation, and Health. See App. 92. See also 42 CFR § 442.1 *et seq.* (1984); 40 Tex.Adm.Code § 27.101 *et seq.* (1981).

***436** The city informed CLC that a special use permit would be required for the operation of a group home at the site, and CLC accordingly submitted a permit application. In response to a subsequent inquiry from CLC, the city explained that under the zoning regulations applicable to the site, a special use permit, renewable annually, was required for the construction of "[h]ospitals for the insane or feeble-minded, or alcoholic [*sic*] or drug addicts, or penal or correctional institutions." [FN3] The city had determined that the proposed ***437** group home should be classified as a "hospital for the feebleminded." After holding a public hearing on CLC's application, the City Council voted 3 to 1 to deny a special use permit. [FN4]

FN3. The site of the home is in an area zoned "R-3," an "Apartment House District." App. 51. Section 8 of the Cleburne zoning ordinance, in pertinent part, allows the following uses in an R-3 district:
"1. Any use permitted in District R-2.
"2. Apartment houses, or multiple dwellings. "3. Boarding and lodging houses.
"4. Fraternity or sorority houses and dormitories.
"5. Apartment hotels.
"6. Hospitals, sanitariums, nursing homes or homes for convalescents or aged, *other than for the* insane or *feeble-minded* or alcoholics or drug addicts."
"7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
"8. Philanthropic or eleemosynary institutions, other than penal institutions.
"9. Accessory uses customarily incident to any of the above uses...." *Id.*, at 60-61 (emphasis added).
Section 16 of the ordinance specifies the uses for which a special use permit is required. These include "[h]ospitals for the insane or feebleminded, or alcoholic [*sic*] or drug addicts, or penal or correctional institutions." *Id.*, at 63. Section 16 provides that a permit for such a use may be issued by "the Governing Body, after public hearing, and after recommendation of the Planning Commission." All special use permits are limited to one year, and each applicant is required "to obtain the signatures of the property owners within two hundred (200) feet of the property to be used." *Ibid.*

FN4. The city's Planning and Zoning Commission had earlier held a hearing and voted to deny the permit. *Id.*, at 91.

CLC then filed suit in Federal District Court against the city and a number of its officials, alleging, *inter alia,* that the zoning ordinance was invalid on its face and as applied because it discriminated against the mentally retarded in violation of the equal protection rights of CLC and its potential residents. The District Court found that "[i]f the potential residents of the Featherston Street home were not mentally retarded, ****3253** but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance," and that the City Counsel's decision "was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded." App. 93, 94. Even so, the District Court held the ordinance and its application constitutional. Concluding that no fundamental right was implicated and that mental retardation was neither a suspect nor a quasi-suspect classification, the court employed the minimum level of judicial scrutiny applicable to equal protection claims. The court deemed the ordinance, as written and applied, to be rationally related to the city's legitimate interests in "the legal responsibility of CLC and its residents, ... the safety and fears of residents in the adjoining neighborhood," and the number of people to be housed in the home. [FN5] *Id.*, at 103.

FN5. The District Court also rejected CLC's other claims, including the argument that the city had violated due process by improperly delegating its zoning powers to the owners of adjoining property. App. 105. Cf. *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928) . The Court of Appeals did not address

this argument, and it has not been raised by the parties in this Court.

The Court of Appeals for the Fifth Circuit reversed, determining that mental retardation was a quasi-suspect classification and that it should assess the validity of the ordinance ***438** under intermediate-level scrutiny. 726 F.2d 191 (1984). Because mental retardation was in fact relevant to many legislative actions, strict scrutiny was not appropriate. But in light of the history of "unfair and often grotesque mistreatment" of the retarded, discrimination against them was "likely to reflect deep-seated prejudice." *Id.*, at 197. In addition, the mentally retarded lacked political power, and their condition was immutable. The court considered heightened scrutiny to be particularly appropriate in this case, because the city's ordinance withheld a benefit which, although not fundamental, was very important to the mentally retarded. Without group homes, the court stated, the retarded could never hope to integrate themselves into the community. [FN6] Applying the test that it considered appropriate, the court held that the ordinance was invalid on its face because it did not substantially further any important governmental interests. The Court of Appeals went on to hold that the ordinance was also invalid as applied. [FN7] Rehearing en banc was ***439** denied ****3254** with six judges dissenting in an opinion urging en banc consideration of the panel's adoption of a heightened standard of review. We granted certiorari, 469 U.S. 1016, 105 S.Ct. 427, 83 L.Ed.2d 354 (1984). [FN8]

FN6. The District Court had found:
"Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community." App. 94.

FN7. The city relied on a recently passed state regulation limiting group homes to 6 residents in support of its argument that the CLC home would be overcrowded with 13. But, the Court of Appeals observed, the city had failed to justify its apparent view that any other group of 13 people could live under these allegedly "crowded" conditions, nor had it explained why 6 would be acceptable but 13 not.
CLC concedes that it could not qualify for certification under the new Texas regulation. Tr. of Oral Rearg. 31. The Court of Appeals stated that the new regulation applied only to applications made after May 1, 1982, and therefore did not apply to the CLC home. 726 F.2d, at 202. The regulation itself contains no grandfather clause, see App. 78-81, and the District Court made no specific finding on this point. See *id.*, at 96. However, the State has asserted in an *amici* brief filed in this Court that " 'the six bed rule' would not pose an obstacle to the proposed Featherston Street group home at issue in this case." Brief for State of Texas et al. as *Amici Curiae* 15, n. 7. If the six-bed requirement were to apply to the home, there is a serious possibility that CLC would no longer be interested in injunctive relief. David Southern, an officer of CLC, testified that "to break even on a facility of this type, you have to have at least ten or eleven residents." App. 32. However, because CLC requested damages as well as an injunction, see *id.*, at 15, the case would not be moot.
After oral argument, the city brought to our attention the recent enactment of a Texas statute, effective September 1, 1985, providing that "family homes" are permitted uses in "all residential zones or districts in this state." The statute defines a "family home" as a community-based residence housing no more than six disabled persons, including the mentally retarded, along with two supervisory personnel. The statute does not appear to affect the city's actions with regard to group homes that plan to house more than six residents. The enactment of this legislation therefore does not affect our disposition of this case.

FN8. *Macon Assn. for Retarded Citizens*

v. Macon-Bibb County Planning and Zoning Comm'n, 252 Ga. 484, 314 S.E.2d 218 (1984), dism'd for want of a substantial federal question, 469 U.S. 802, 105 S.Ct. 57, 83 L.Ed.2d 8 (1984), has no controlling effect on this case. *Macon Assn. for Retarded Citizens* involved an ordinance that had the effect of excluding a group home for the retarded only because it restricted dwelling units to those occupied by a single family, defined as no more than four unrelated persons. In *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), we upheld the constitutionality of a similar ordinance, and the Georgia Supreme Court in *Macon Assn.* specifically held that the ordinance did not discriminate against the retarded. 252 Ga., at 487, 314 S.E.2d, at 221.

II

[1][2][3] The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982). Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for ***440** determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v. Wilson,* 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981); *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 174-175, 101 S.Ct. 453, 459-460, 66 L.Ed.2d 368 (1980); *Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939, 942, 59 L.Ed.2d 171 (1979); *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976). When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, *United States Railroad Retirement Board v. Fritz, supra,* 449 U.S., at 174, 101 S.Ct., at 459; *New Orleans v. Dukes, supra,* 427 U.S., at 303, 96 S.Ct., at 2516, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

[4][5] The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy--a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *McLaughlin v. Florida,* 379 U.S. 184, 192, 85 S.Ct. 283, 288, 13 L.Ed.2d 222 (1964); *Graham v. Richardson,* 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution. *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969); *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

[6][7] Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability ... is that the ****3255** sex characteristic ***441** frequently bears no relation to ability to perform or contribute to society." *Frontiero v. Richardson,* 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973) (plurality opinion). Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest. *Mississippi University for Women v. Hogan,* 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982); *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Because illegitimacy is

beyond the individual's control and bears "no relation to the individual's ability to participate in and contribute to society," *Mathews v. Lucas,* 427 U.S. 495, 505, 96 S.Ct. 2755, 2762, 49 L.Ed.2d 651 (1976),. official discriminations resting on that characteristic are also subject to somewhat heightened review. Those restrictions "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest." *Mills v. Habluetzel,* 456 U.S. 91, 99, 102 S.Ct. 1549, 1554, 71 L.Ed.2d 770 (1982).

We have declined, however, to extend heightened review to differential treatment based on age:

> "While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313, 96 S.Ct. 2562, 2567, 49 L.Ed.2d 520 (1976).

[8] The lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be ***442** pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

III

[9] Against this background, we conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. First, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. [FN9] They are thus different, immutably ****3256** so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. [FN10] How this large and diversified group is to be treated ***443** under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

> FN9. Mentally retarded individuals fall into four distinct categories. The vast majority--approximately 89%--are classified as "mildly" retarded, meaning that their IQ is between 50 and 70. Approximately 6% are "moderately" retarded, with IQs between 35 and 50. The remaining two categories are "severe" (IQs of 20 to 35) and "profound" (IQs below 20). These last two categories together account for about 5% of the mentally retarded population. App. 39 (testimony of Dr. Philip Roos).
>
> Mental retardation is not defined by reference to intelligence or IQ alone, however. The American Association on Mental Deficiency (AAMD) has defined mental retardation as " 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.' " Brief for AAMD et al. as *Amici Curiae* 3 (quoting AAMD, Classification in Mental Retardation 1 (H. Grosman ed. 1983)). "Deficits in adaptive behavior" are limitations on general ability to meet the standards of maturation, learning, personal independence, and social responsibility expected for an individual's age level and cultural group. Brief for AAMD et al. as *Amici Curiae* 4, n. 1. Mental retardation is caused by a variety of factors, some genetic, some environmental, and some

unknown. *Id.*, at 4.

FN10. As Dean Ely has observed:
"Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that *those* characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?" J. Ely, Democracy and Distrust 150 (1980) (footnote omitted). See also *id.*, at 154-155.

Second, the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary. Thus, the Federal Government has not only outlawed discrimination against the mentally retarded in federally funded programs, see § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, but it has also provided the retarded with the right to receive "appropriate treatment, services, and habilitation" in a setting that is "least restrictive of [their] personal liberty." Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010(1), (2). In addition, the Government has conditioned federal education funds on a State's assurance that retarded children will enjoy an education that, "to the maximum extent appropriate," is integrated with that of nonmentally retarded children. Education of the Handicapped Act, 20 U.S.C. § 1412(5)(B). The Government has also facilitated the hiring of the mentally retarded into the federal civil service by exempting them from the requirement of competitive examination. ***444** See 5 CFR § 213.3102(t) (1984). The State of Texas has similarly enacted legislation that acknowledges the special status of the mentally retarded by conferring certain rights upon them, such as "the right to live in the least restrictive setting appropriate to [their] individual needs and abilities," including "the right to live ... in a group home." Mentally Retarded Persons Act of 1977, Tex.Rev.Civ.Stat.Ann., Art. 5547-300, § 7 (Vernon Supp.1985). [FN11]

FN11. CLC originally sought relief under the Act, but voluntarily dismissed this pendent state claim when the District Court indicated that its presence might make abstention appropriate. The Act had never been construed by the Texas courts. App. 12, 14, 84-87.
A number of States have passed legislation prohibiting zoning that excludes the retarded. See, *e.g.*, Cal.Health & Safety Code Ann. § 1566 *et seq.* (West 1979 and Supp.1985); Conn.Gen.Stat. § 8-3e (Supp.1985); N.D.Cent.Code § 25-16-14(2) (Supp.1983); R.I.Gen.Laws, § 45-24-22 (1980). See also Md.Health Code Ann. § 7-102 (Supp.1984).

Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable. It may be, as CLC contends, that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny. See Brief for Respondents 38-41. The relevant inquiry, however, is whether heightened ****3257** scrutiny is constitutionally mandated in the first instance. Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all. Much recent legislation intended to benefit the retarded also assumes the need for measures that might be perceived to disadvantage them. The Education of the Handicapped Act, for example, requires an "appropriate" education, not one that is equal in all respects ***445** to the education of

nonretarded children; clearly, admission to a class that exceeded the abilities of a retarded child would not be appropriate. [FN12] Similarly, the Developmental Disabilities Assistance Act and the Texas Act give the retarded the right to live only in the "least restrictive setting" appropriate to their abilities, implicitly assuming the need for at least some restrictions that would not be imposed on others. [FN13] Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts.

> FN12. The Act, which specifically included the mentally retarded in its definition of handicapped, see 20 U.S.C. § 1401(1), also recognizes the great variations within the classification of retarded children. The Act requires that school authorities devise an "individualized educational program," § 1401(19), that is "tailored to the unique needs of the handicapped child." *Hendrick Hudson District Board of Education v. Rowley,* 458 U.S. 176, 181, 102 S.Ct. 3034, 3038, 73 L.Ed.2d 690 (1982).
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> FN13. The Developmental Disabilities Assistance Act also withholds public funds from any program that does not prohibit the use of physical restraint "unless absolutely necessary." 42 U.S.C. § 6010(3)

Third, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.

Fourth, if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only ***446** the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

[10] Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious ****3258** discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. See *Zobel v. Williams,* 457 U.S. 55, 61-63, 102 S.Ct. 2309, 2313-2314, 72 L.Ed.2d 672 (1982); *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528, 535, 93 S.Ct. 2821, 2826, 37 L.Ed.2d 782 (1973). Furthermore, some objectives--***447** such as

"a bare ... desire to harm a politically unpopular group," *id.*, at 534, 93 S.Ct., at 2826--are not legitimate state interests. See also *Zobel, supra,* 457 U.S., at 63, 102 S.Ct., at 2314. Beyond that, the mentally retarded, like others, have and retain their substantive constitutional rights in addition to the right to be treated equally by the law.

IV

We turn to the issue of the validity of the zoning ordinance insofar as it requires a special use permit for homes for the mentally retarded. [FN14] We inquire first whether requiring a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the city may never insist on a special use permit for a home for the mentally retarded in an R-3 zone. This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments. *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 501-502, 105 S.Ct. 2794, ----, 86 L.Ed.2d 394 (1985); *United States v. Grace,* 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983); *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

> FN14. It goes without saying that there is nothing before us with respect to the validity of requiring a special use permit for the other uses listed in the ordinance. See n. 3, *supra.*

The constitutional issue is clearly posed. The city does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home, and it does so, as the District Court found, because it would be a facility for the mentally ***448** retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?

[11] It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.

[12][13] The District Court found that the City Council's insistence on the permit rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners ****3259** located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, *Lucas v. Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, 736-737, 84 S.Ct. 1459, 1473-1474, 12 L.Ed.2d 632 (1964), and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 1882, 80 L.Ed.2d 421 (1984).

***449** Second, the Council had two objections to the location of the facility. It was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to

validate what would otherwise be an equal protection violation. The other objection to the home's location was that it was located on "a five hundred year flood plain." This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit. The same may be said of another concern of the Council--doubts about the legal responsibility for actions which the mentally retarded might take. If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.

Fourth, the Council was concerned with the size of the home and the number of people that would occupy it. The District Court found, and the Court of Appeals repeated, that "[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance." App. 93; 726 F.2d, at 200. Given this finding, there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability ***450** not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state standards for group housing in the community; and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type. See 42 CFR § 442.447 (1984). In the words of the Court of Appeals, "[t]he City never justifies its apparent view that other people can live under such 'crowded' conditions when mentally retarded persons cannot." 726 F.2d, at 202.

In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening ****3260** congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.

The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

The judgment of the Court of Appeals is affirmed insofar as it invalidates the zoning ordinance as applied to the Featherston home. The judgment is otherwise vacated, and the case is remanded.

It is so ordered.

***451** Justice STEVENS, with whom THE CHIEF JUSTICE joins, concurring.

The Court of Appeals disposed of this case as if a critical question to be decided were which of three clearly defined standards of equal protection review should be applied to a legislative classification discriminating against the mentally retarded. [FN1] In fact, our cases have not delineated three-- or even one or two--such well-defined standards. [FN2] Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from "strict scrutiny" at one extreme to "rational basis" at the other. I have never been persuaded that these so-called "standards" adequately explain the

decisional process. [FN3] Cases involving classifications based on alienage, ***452** illegal residency, illegitimacy, gender, age, or--as in this case--mental retardation, do not fit well into sharply defined classifications.

FN1. The three standards--"rationally related to a legitimate state interest," "somewhat heightened review," and "strict scrutiny" are briefly described *ante,* at 3254-3255.

FN2. In *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 176-177, n. 10, 101 S.Ct. 453, 460-461, n. 10, 66 L.Ed.2d 368 (1980), after citing 11 cases applying the rational-basis standard, the Court stated: "The most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles." Commenting on the intermediate standard of review in his dissent in *Craig v. Boren,* 429 U.S. 190, 220-221, 97 S.Ct. 451, 469, 50 L.Ed.2d 397 (1976), Justice REHNQUIST wrote:
"I would think we have had enough difficulty with the two standards of review which our cases have recognized--the norm of 'rational basis,' and the 'compelling state interest' required where a 'suspect classification' is involved--so as to counsel weightily against the insertion of still another 'standard' between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough."

FN3. Cf. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 98, 93 S.Ct. 1278, 1330, 36 L.Ed.2d 16 (1973) (MARSHALL, J., dissenting, joined by Douglas, J.) (criticizing "the Court's rigidified approach to equal protection analysis").

"I am inclined to believe that what has become known as the [tiered] analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." *Craig v. Boren,* 429 U.S. 190, 212, 97 S.Ct. 452, 464, 50 L.Ed.2d 397 (1976) (STEVENS, J., concurring). In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes ****3261** a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. [FN4] Thus, the word "rational"--for me at least--includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially. [FN5]

FN4. "I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature. If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred." *United States Railroad Retirement Board v. Fritz,* 449 U.S., at 180-181, 101 S.Ct., at 462-463 (STEVENS, J., concurring in judgment).

FN5. See *Lehr v. Robertson,* 463 U.S. 248, 265, 103 S.Ct. 2985, 2995, 77 L.Ed.2d 614 (1983); *Hampton v. Mow Sun Wong,* 426 U.S. 88, 100, 96 S.Ct. 1895, 1903, 48 L.Ed.2d 495 (1976).

The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all ***453** on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny," to decide such cases.

In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? [FN6] What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? [FN7] In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, [FN8] gender, [FN9] or illegitimacy. [FN10] But that is not because we ***454** apply an "intermediate standard of review" in these cases; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant ****3262** to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve. [FN11]

FN6. The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a "tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship--other than pure prejudicial discrimination--to the stated purpose for which the classification is being made." *Mathews v. Lucas,* 427 U.S. 495, 520-521, 96 S.Ct. 2755, 2769, 49 L.Ed.2d 651 (1976) (STEVENS, J., dissenting). See also *New York Transit Authority v. Beazer,* 440 U.S. 568, 593, 99 S.Ct. 1355, 1369, 59 L.Ed.2d 587 (1979).

FN7. See *Foley v. Connelie,* 435 U.S. 291, 308, 98 S.Ct. 1067, 1077, 55 L.Ed.2d 287 (1978) (STEVENS, J., dissenting).

FN8. See *Mathews v. Diaz,* 426 U.S. 67, 78-80, 96 S.Ct. 1883, 1890- 1892, 48 L.Ed.2d 478 (1976); compare *Sugarman v. Dougall,* 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973), and *In re Griffiths,* 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), with *Ambach v. Norwick,* 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979), and *Foley v. Connelie,* 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978).

FN9. Compare *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), and *Califano v. Goldfarb,* 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977), with *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), and *Heckler v. Mathews,* 465 U.S. 728, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984).

FN10. Compare *Lalli v. Lalli,* 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978), with *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

FN11. See *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 497-498, and n. 4, 101 S.Ct. 1200, 1218-1219, and n. 4, 67 L.Ed.2d 437 (1981) (STEVENS, J., dissenting). See also *Caban v. Mohammed,* 441 U.S. 380, 406-407, 99 S.Ct. 1760, 1775-1776, 60 L.Ed.2d 297 (1979) (STEVENS, J., dissenting) ("But as a matter of equal protection analysis, it is perfectly obvious

> that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process").

Every law that places the mentally retarded in a special class is not presumptively irrational. The differences between mentally retarded persons and those with greater mental capacity are obviously relevant to certain legislative decisions. An impartial lawmaker--indeed, even a member of a class of persons defined as mentally retarded--could rationally vote in favor of a law providing funds for special education and special treatment for the mentally retarded. A mentally retarded person could also recognize that he is a member of a class that might need special supervision in some situations, both to protect himself and to protect others. Restrictions on his right to drive cars or to operate hazardous equipment might well seem rational even though they deprived him of employment opportunities and the kind of freedom of travel enjoyed by other citizens. "That a civilized and decent society expects and approves such legislation indicates that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable." *Ante*, at 3257.

Even so, the Court of Appeals correctly observed that through ignorance and prejudice the mentally retarded "have been subjected to a history of unfair and often grotesque mistreatment." 726 F.2d 191, 197 (CA5 1984). The discrimination ***455** against the mentally retarded that is at issue in this case is the city's decision to require an annual special use permit before property in an apartment house district may be used as a group home for persons who are mildly retarded. The record convinces me that this permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in respondent's home. [FN12]

> FN12. In fact, the ordinance provides that each applicant for a special use permit "shall be required to obtain the signatures of the property owners within two hundred (200) feet of the property to be used."
>
> App. 63.

Although the city argued in the Court of Appeals that legitimate interests of the neighbors justified the restriction, the court unambiguously rejected that argument. *Id.*, at 201. In this Court, the city has argued that the discrimination was really motivated by a desire to protect the mentally retarded from the hazards presented by the neighborhood. Zoning ordinances are not usually justified on any such basis, and in this case, for the reasons explained by the Court, *ante*, at 3258-3260, I find that justification wholly unconvincing. I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case.

Accordingly, I join the opinion of the Court.

Justice MARSHALL, with whom Justice BRENNAN and Justice BLACKMUN join, concurring in the judgment in part and dissenting in part.

The Court holds that all retarded individuals cannot be grouped together as the "feebleminded" and deemed presumptively unfit to live in a community. Underlying this holding is the principle that mental retardation *per se* cannot be a proxy for depriving retarded people of their rights and interests without regard to variations in individual ability. ***456** With this holding and principle I agree. The Equal Protection Clause requires attention to the capacities ****3263** and needs of retarded people as individuals.

I cannot agree, however, with the way in which the Court reaches its result or with the narrow, as-applied remedy it provides for the city of Cleburne's equal protection violation. The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review--the heightened scrutiny--that actually leads to its

invalidation. Moreover, in invalidating Cleburne's exclusion of the "feebleminded" only as applied to respondents, rather than on its face, the Court radically departs from our equal protection precedents. Because I dissent from this novel and truncated remedy, and because I cannot accept the Court's disclaimer that no "more exacting standard" than ordinary rational-basis review is being applied, *ante,* at 3256, I write separately.

I

At the outset, two curious and paradoxical aspects of the Court's opinion must be noted. First, because the Court invalidates Cleburne's zoning ordinance on rational-basis grounds, the Court's wide-ranging discussion of heightened scrutiny is wholly superfluous to the decision of this case. This "two for the price of one" approach to constitutional decisionmaking--rendering two constitutional rulings where one is enough to decide the case--stands on their head traditional and deeply embedded principles governing exercise of the Court's Article III power. Just a few weeks ago, the Court "call[ed] to mind two of the cardinal rules governing ***457** the federal courts: 'One, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 501, 105 S.Ct. 2794, ----, 86 L.Ed.2d 394 (1985) (WHITE, J.) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885)). [FN1] When a lower court correctly decides a case, albeit on what this Court concludes are unnecessary constitutional grounds, [FN2] "our usual custom" is not to compound the problem by following suit but rather to affirm on the narrower, dispositive ground available. *Alexander v. Louisiana,* 405 U.S. 625, 633, 92 S.Ct. 1221, 1226, 31 L.Ed.2d 536 (1972). [FN3] The Court offers no principled justification for departing from these principles, nor, given our equal protection precedents, could it. See *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724, n. 9, 102 S.Ct. 3331, 3336, n. 9, 73 L.Ed.2d 1090 (1982) (declining to address strict scrutiny when heightened ****3264** scrutiny sufficient to invalidate action challenged); *Stanton v. Stanton,* 421 U.S. 7, 13, 95 S.Ct. 1373, 1377, 43 L.Ed.2d 688 (1975) ***458** same); *Hooper v. Bernalillo County Assessor,* 472 U.S. 612, 618, 105 S.Ct. 2862, ----, 86 L.Ed.2d 487 (1985) (declining to reach heightened scrutiny in review of residency-based classifications that fail rational-basis test); *Zobel v. Williams,* 457 U.S. 55, 60-61, 102 S.Ct. 2309, 2312-2313, 72 L.Ed.2d 672 (1982) (same); cf. *Mitchell v. Forsyth,* 472 U.S. 511, 537-538, 105 S.Ct. 2806, ----, 86 L.Ed.2d 411 (1985) (O'CONNOR, J., concurring in part).

FN1. See also *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105, 65 S.Ct. 152, 154, 89 L.Ed. 101 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable"); *Burton v. United States,* 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case"); see generally *Ashwander v. TVA,* 297 U.S. 288, 346-348, 56 S.Ct. 466, 482-484, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).
Even today, the Court again "calls to mind" these principles, *ante,* at 3258, but given the Court's lengthy dicta on heightened scrutiny, this call to principle must be read with some irony.

FN2. I do not suggest the lower court erred in relying on heightened scrutiny, for I believe more searching inquiry than the traditional rational-basis test is required to invalidate Cleburne's ordinance. See *infra,* at 3264-3265.

FN3. See also *Three Affiliated Tribes v. Wold Engineering,* 467 U.S. 138, 157-158, 104 S.Ct. 2267, 2278-2279, 81 L.Ed.2d 113 (1984); *Leroy v. Great Western United Corp.,* 443 U.S. 173, 181, 99 S.Ct. 2710, 2715, 61 L.Ed.2d 464 (1979).

Second, the Court's heightened-scrutiny discussion

is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny. To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called "second order" rational-basis review rather than "heightened scrutiny." But however labeled, the rational basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), and their progeny.

The Court, for example, concludes that legitimate concerns for fire hazards or the serenity of the neighborhood do not justify singling out respondents to bear the burdens of these concerns, for analogous permitted uses appear to pose similar threats. Yet under the traditional and most minimal version of the rational-basis test, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma, Inc., supra*, 348 U.S., at 489, 75 S.Ct., at 465; see *American Federation of Labor v. American Sash Co.*, 335 U.S. 538, 69 S.Ct. 258, 93 L.Ed. 222 (1949); *Semler v. Dental Examiners*, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935). The "record" is said not to support the ordinance's classifications, *ante*, at 3259, 3260, but under the traditional standard we do not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196, 103 S.Ct. 2296, 2308, 76 L.Ed.2d 497 (1983); ***459** *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-462, 464, 101 S.Ct. 715, 722-723, 724, 66 L.Ed.2d 659 (1981); *Firemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 138-139, 89 S.Ct. 323, 327-328, 21 L.Ed.2d 289 (1968). Finally, the Court further finds it "difficult to believe" that the retarded present different or special hazards inapplicable to other groups. In normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible; legislation is presumptively constitutional, and a State "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference" to its goals. *Allied Stores of Ohio, Inc. v. Bowers, supra*, 358 U.S., at 527, 79 S.Ct., at 441; see *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976); *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 68-70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913).

I share the Court's criticisms of the overly broad lines that Cleburne's zoning ordinance has drawn. But if the ordinance is to be invalidated for its imprecise classifications, it must be pursuant to more powerful scrutiny than the minimal rational-basis test used to review classifications affecting only economic and commercial matters. The same imprecision in a similar ordinance that required opticians but not optometrists to be licensed to practice, see *Williamson v. Lee Optical of Oklahoma, Inc., supra*, or that excluded new but not old businesses from parts of a community, see *New Orleans v. Dukes, supra*, would hardly be fatal to the statutory scheme.

The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate ****3265** in at least two respects. [FN4] The suggestion that ***460** the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching "ordinary" rational-basis review--a small and regrettable step back toward the days of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). Moreover, by failing to articulate the factors that justify today's "second order" rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny. Candor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the careful scrutiny it today receives.

FN4. The two cases the Court cites in its rational-basis discussion, *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982), and *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 93

S.Ct. 2821, 37 L.Ed.2d 782 (1973), expose the special nature of the rational-basis test employed today. As two of only a handful of modern equal protection cases striking down legislation under what purports to be a rational-basis standard, these cases must be and generally have been viewed as intermediate review decisions masquerading in rational-basis language. See, *e.g.*, L. Tribe, American Constitutional Law § 16-31, p. 1090, n. 10 (1978) (discussing *Moreno*); see also *Moreno, supra,* at 538, 93 S.Ct., at 2828 (Douglas, J., concurring); *Zobel, supra,* 457 U.S., at 65, 102 S.Ct., at 2315 (Brennan, J., concurring).

II

I have long believed the level of scrutiny employed in an equal protection case should vary with "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 99, 93 S.Ct. 1278, 1330, 36 L.Ed.2d 16 (1973) (MARSHALL, J., dissenting). See also *Plyler v. Doe,* 457 U.S. 202, 230-231, 102 S.Ct. 2382, 2401-2402, 72 L.Ed.2d 786 (1982) (MARSHALL, J., concurring); *Dandridge v. Williams,* 397 U.S. 471, 508, 90 S.Ct. 1153, 1173, 25 L.Ed.2d 491 (1970) (MARSHALL, J., dissenting). When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes. *Plyler, supra; Mississippi University for Women v. Hogan,* 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982); *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) ; *Mills v. Habluetzel,* 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982); see also *Buchanan v. Warley,* 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917).

***461** First, the interest of the retarded in establishing group homes is substantial. The right to "establish a home" has long been cherished as one of the fundamental liberties embraced by the Due Process Clause. See *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). For retarded adults, this right means living together in group homes, for as deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community. The District Court found as a matter of fact that

> "[t]he availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community." App. to Pet. for Cert. A-8.

Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment--the ability to form bonds and take part in the life of a community. [FN5]

> FN5. Indeed, the group home in this case was specifically located near a park, a school, and a shopping center so that its residents would have full access to the community at large.

****3266** Second, the mentally retarded have been subject to a "lengthy and tragic history," *University of California Regents v. Bakke,* 438 U.S. 265, 303, 98 S.Ct. 2733, 2755, 57 L.Ed.2d 750 (1978) (opinion of POWELL, J.), of segregation and discrimination that can only be called grotesque. During much of the 19th century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices. [FN6] By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme ***462** xenophobia of those years, [FN7] leading medical authorities and others began to portray the "feeble-minded" as a "menace to society and civilization ... responsible in a large degree for many, if not all, of our social problems." [FN8] A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." [FN9]

Retarded children were categorically excluded from ***463** public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. [FN10] State laws deemed the retarded "unfit for citizenship." [FN11]

FN6. S. Herr, Rights and Advocacy for Retarded People 18 (1983).

FN7. On the role of these ideologies in this era, see K. Stampp, Era of Reconstruction, 1865-1877, pp. 18-22 (1965).

FN8. H. Goddard, The Possibilities of Research as Applied to the Prevention of Feeblemindedness, Proceedings of the National Conference of Charities and Correction 307 (1915), cited in A. Deutsch, The Mentally Ill in America 360 (2d ed. 1949). See also Fernald, The Burden of Feeblemindedness, 17 J. Psycho-Asthenics 87, 90 (1913) (the retarded "cause unutterable sorrow at home and are a menace and danger to the community"); Terman, Feeble-Minded Children in the Public Schools of California, 5 Schools & Society 161 (1917) ("[O]nly recently have we begun to recognize how serious a menace [feeblemindedness] is to the social, economic and moral welfare of the state.... [I]t is responsible ... for the majority of cases of chronic and semi-chronic pauperism, and for much of our alcoholism, prostitution, and venereal diseases"). Books with titles such as "The Menace of the Feeble Minded in Connecticut" (1915), issued by the Connecticut School for Imbeciles, became commonplace. See C. Frazier, (Chairman, Executive Committee of Public Charities Assn. of Pennsylvania), The Menace of the Feeble-Minded In Pennsylvania (1913); W. Fernald, The Burden of Feeble-Mindedness (1912) (Mass.); Juvenile Protection Association of Cincinnati, The Feeble-Minded, Or the Hub to Our Wheel of Vice (1915) (Ohio). The resemblance to such works as R. Shufeldt, The Negro: A Menace to American Civilization (1907), is striking, and not coincidental.

FN9. A. Moore, The Feeble-Minded in New York 3 (1911). This book was sponsored by the State Charities Aid Association. See also P. Tyor & L. Bell, Caring for the Retarded in America 71-104 (1984). The segregationist purpose of these laws was clear. See, *e.g.*, Act of Mar. 22, 1915, ch. 90, 1915 Tex.Gen.Laws 143 (repealed 1955) (Act designed to relieve society of "the heavy economic and moral losses arising from the existence at large of these unfortunate persons").

FN10. See *Pennsylvania Assn. for Retarded Children v. Pennsylvania,* 343 F.Supp. 279, 294-295 (ED Pa.1972); see generally S. Sarason & J. Doris, Educational Handicap, Public Policy, and Social History 271-272 (1979).

FN11. Act of Apr. 3, 1920, ch. 210, § 17, 1920 Miss.Laws 288, 294.

Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the "basic civil rights of man"--the right to marry and procreate. *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942). Marriages of the retarded were made, and in some States continue to be, not only voidable but also often a criminal offense. [FN12] The ****3267** purpose of such limitations, which frequently applied only to women of child-bearing age, was unabashedly eugenic: to prevent the retarded from propagating. [FN13] To assure this end, 29 States enacted compulsory eugenic sterilization laws between 1907 and 1931. J. Landman, Human Sterilization 302-303 (1932). See *Buck v. Bell,* 274 U.S. 200, 207, 47 S.Ct. 584, 584, 71 L.Ed. 1000 (1927) (Holmes, J.); cf. ***464***Plessy v. Fergu* son, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); *Bradwell v. Illinois,* 16 Wall. 130, 141, 21 L.Ed. 442 (1873) (Bradley, J., concurring in judgment).

FN12. See, *e.g.*, Act of Mar. 19, 1928, ch. 156, 1928 Ky. Acts 534, *remains in effect,*

Ky.Rev.Stat. § 402.990(2) (1984); Act of May 25, 1905, No. 136, § 1, 1905 Mich.Pub.Acts 185, 186, *remains in effect,* Mich.Comp.Laws § 551.6 (1979); Act of Apr. 3, 1920, ch. 210, § 29, 1920 Miss.Gen.Laws 288, 300, *remains in effect* with minor changes, Miss.Code Ann. § 41-21-45 (1972).

FN13. See Chamberlain, Current Legislation--Eugenics and Limitations of Marriage, 9 A.B.A.J. 429 (1923); *Lau v. Lau,* 81 N.H. 44, 122 A. 345, 346 (1923); *State v. Wyman,* 118 Conn. 501, 173 A. 155, 156 (1934). See generally Linn & Bowers, The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons--The Eternal Child Grows Up, 13 Gonz.L.Rev. 625 (1978); Shaman, Persons Who Are Mentally Retarded: Their Right to Marry and Have Children, 12 Family L.Q. 61 (1978); Note, The Right of the Mentally Disabled to Marry: A Statutory Evaluation, 15 J.Family L. 463 (1977).

Prejudice, once let loose, is not easily cabined. See *University of California Regents v. Bakke,* 438 U.S. 265, 395, 98 S.Ct. 2733, 2801, 57 L.Ed.2d 750 (opinion of MARSHALL, J.). As of 1979, most States still categorically disqualified "idiots" from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials. [FN14] Not until Congress enacted the Education of the Handicapped Act, 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.,* were "the door[s] of public education" opened wide to handicapped children. *Hendrick Hudson District Board of Education v. Rowley,* 458 U.S. 176, 192, 102 S.Ct. 3034, 3043, 73 L.Ed.2d 690 (1982). [FN15] But most important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them. [FN16]

FN14. See Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979).

FN15. Congress expressly found that most handicapped children, including the retarded, were simply shut out from the public school system. See 20 U.S.C. § 1400(b).

FN16. See generally G. Allport, The Nature of Prejudice (1958) (separateness among groups exaggerates differences).

In light of the importance of the interest at stake and the history of discrimination the retarded have suffered, the Equal Protection Clause requires us to do more than review the distinctions drawn by Cleburne's zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation. [FN17] The searching scrutiny I would give to restrictions ***465** on the ability of the retarded to establish community group homes leads me to conclude that Cleburne's vague generalizations for classifying the "feeble-minded" with drug addicts, alcoholics, and the insane, and excluding them where the elderly, the ill, the boarder, and the transient are allowed, are not substantial or important enough to overcome the suspicion that the ordinance rests on impermissible assumptions or outmoded ****3268** and perhaps invidious stereotypes. See *Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Roberts v. United States Jaycees,* 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *Mississippi University for Women v. Hogan,* 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982); *Mills v. Habluetzel,* 456 U.S. 91, 102 S.Ct. 1549, 71 L.Ed.2d 770 (1982).

FN17. This history of discrimination may well be directly relevant to the issue before the Court. Cleburne's current exclusion of the "feeble-minded" in its 1965 zoning ordinance appeared as a similar exclusion of the "feeble-minded" in the city's 1947 ordinance, see Act of Sept. 26, 1947, § 5; the latter tracked word for word a similar exclusion in the 1929 comprehensive zoning ordinance for the nearby city of Dallas. See Dallas Ordinance, No. 2052, § 4, passed Sept. 11, 1929.
Although we have been presented with no legislative history for Cleburne's zoning ordinances, this genealogy strongly suggests that Cleburne's current exclusion of the "feeble-minded" was written in the

> darkest days of segregation and stigmatization of the retarded and simply carried over to the current ordinance. Recently we held that extant laws originally motivated by a discriminatory purpose continue to violate the Equal Protection Clause, even if they would be permissible were they reenacted without a discriminatory motive. See *Hunter v. Underwood,* 471 U.S. 222, 223, 105 S.Ct. 1916, 1922-1923, 85 L.Ed.2d 222 (1985). But in any event, the roots of a law that by its terms excludes from a community the "feebleminded" are clear. As the examples above attest, see n. 7, *supra,* "feebleminded" was the defining term for all retarded people in the era of overt and pervasive discrimination.

III

In its effort to show that Cleburne's ordinance can be struck down under no "more exacting standard ... than is normally accorded economic and social legislation," *ante,* at 3256, the Court offers several justifications as to why the retarded do not warrant heightened judicial solicitude. These justifications, however, find no support in our heightened-scrutiny precedents and cannot withstand logical analysis.

The Court downplays the lengthy "history of purposeful unequal treatment" of the retarded, see *San Antonio Independent School District v. Rodriguez,* 411 U.S., at 28, 93 S.Ct., at 1294, by pointing to recent legislative action that is said to "beli[e] a continuing antipathy or prejudice." *Ante,* at 3257. Building on this point, the Court similarly concludes that the retarded ***466** are not "politically powerless" and deserve no greater judicial protection than "[a]ny minority" that wins some political battles and loses others. *Ante,* at 3257. The import of these conclusions, it seems, is that the only discrimination courts may remedy is the discrimination they alone are perspicacious enough to see. Once society begins to recognize certain practices as discriminatory, in part because previously stigmatized groups have mobilized politically to lift this stigma, the Court would refrain from approaching such practices with the added skepticism of heightened scrutiny.

Courts, however, do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Compare *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), and *Bradwell v. Illinois, supra,* 16 Wall., at 141 (Bradley, J., concurring in judgment), with *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality. In an analysis the Court today ignores, the Court reached this very conclusion when it extended heightened scrutiny to gender classifications and drew on parallel legislative developments to support that extension:

> "[O]ver the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications [***467** citing examples]. Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration." *Frontiero v. Richardson,* 411 U.S., at 687, 93 S.Ct., at 1770. [FN18]
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> FN18. Although *Frontiero* was a plurality opinion, it is now well established that gender classifications receive heightened scrutiny. See, *e.g., Mississippi University for Women v. Hogan,* 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).

Moreover, even when judicial action *has* catalyzed legislative change, that change certainly does not eviscerate the underlying constitutional principle. The Court, for example, has never suggested that

race-based classifications became any less suspect **3269 once extensive legislation had been enacted on the subject. See *Palmore v. Sidoti,* 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984).

For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; out-dated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people. Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the retarded is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in the Fourteenth Amendment.

The Court also offers a more general view of heightened scrutiny, a view focused primarily on when heightened scrutiny does *not* apply as opposed to when it does apply. [FN19] Two ***468** principles appear central to the Court's theory. First, heightened scrutiny is said to be inapplicable where *individuals* in a group have distinguishing characteristics that legislatures properly may take into account in some circumstances. *Ante,* at 3255, 3258. Heightened scrutiny is also purportedly inappropriate when many legislative classifications affecting the *group* are likely to be valid. We must, so the Court says, "look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us," in deciding whether to apply heightened scrutiny. *Ante,* at 3258.

> FN19. For its general theories about heightened scrutiny, the Court relies heavily, indeed virtually exclusively, on the "lesson" of *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). The brief *per curiam* in *Murgia,* however, was handed down in the days before the Court explicitly acknowledged the existence of heightened scrutiny. See *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *id.,* at 210, 97 S.Ct., at 463 (POWELL, J., concurring). *Murgia* explains why age-based distinctions do not trigger strict scrutiny, but says nothing about whether such distinctions warrant heightened scrutiny. Nor have subsequent cases addressed this issue. See *Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939, 942, 59 L.Ed.2d 171 (1979).

If the Court's first principle were sound, heightened scrutiny would have to await a day when people could be cut from a cookie mold. Women are hardly alike in all their characteristics, but heightened scrutiny applies to them because legislatures can rarely use gender itself as a proxy for these other characteristics. Permissible distinctions between persons must bear a reasonable relationship to their *relevant* characteristics, *Zobel v. Williams,* 457 U.S., at 70, 102 S.Ct., at 2318 (BRENNAN, J., concurring), and gender *per se* is almost never relevant. Similarly, that some retarded people have reduced capacities in some areas does not justify using retardation as a proxy for reduced capacity in areas where relevant individual variations in capacity do exist.

The Court's second assertion--that the standard of review must be fixed with reference to the number of classifications to which a characteristic would validly be relevant--is similarly flawed. Certainly the assertion is not a logical one; that a characteristic may be relevant under some or even many circumstances does not suggest any reason to presume it relevant under other circumstances where there is reason to suspect it is not. A sign that says "men only" looks very ***469** different on a bathroom door than a courthouse door. But see *Bradwell v. Illinois,* 16 Wall. 130, 21 L.Ed. 442 (1873).

Our heightened-scrutiny precedents belie the claim that a characteristic must virtually always be irrelevant to warrant heightened scrutiny. *Plyler,* for example, held that the status of being an undocumented alien is not a "constitutional irrelevancy," and therefore declined to review with strict scrutiny classifications affecting undocumented aliens. 457 U.S., at 219, n. 19, 102 S.Ct., at 2396, n. 19. While *Frontiero,* stated that gender "frequently" and "often" **3270 bears no relation to legitimate legislative aims, it did not deem gender an impermissible basis of state action in all circumstances. 411 U.S., at 686-687, 93

S.Ct., at 1770-1771. Indeed, the Court has upheld some gender-based classifications. *Rostker v. Goldberg,* 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981); *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981). Heightened but not strict scrutiny is considered appropriate in areas such as gender, illegitimacy, or alienage [FN20] because the Court views the trait as relevant under some circumstances but not others. [FN21] That view--indeed the very concept of heightened, as opposed to strict, scrutiny--is flatly inconsistent with the notion that heightened scrutiny should not apply to the retarded because "mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions." *Ante,* at 3258. Because the government also may not take this characteristic into account in many circumstances, such as those presented here, careful review is required to separate the permissible from the invalid in classifications relying on retardation.

> FN20. Alienage classifications present a related variant, for strict scrutiny is applied to such classifications in the economic and social area, but only heightened scrutiny is applied when the classification relates to "political functions." *Cabell v. Chavez-Salido,* 454 U.S. 432, 439, 102 S.Ct. 735, 739, 70 L.Ed.2d 677 (1982); see also *Bernal v. Fainter,* 467 U.S. 216, 220-222, 104 S.Ct. 2312, 2316-2317, 81 L.Ed.2d 175 (1984). Thus, characterization of the area to which an alienage classification applies is necessary to determine how strongly it must be justified.

> FN21. I express no view here as to whether strict scrutiny ought to be extended to these classifications.

***470** The fact that retardation may be deemed a constitutional irrelevancy in *some* circumstances is enough, given the history of discrimination the retarded have suffered, to require careful judicial review of classifications singling out the retarded for special burdens. Although the Court acknowledges that many instances of invidious discrimination against the retarded still exist, the Court boldly asserts that "in the vast majority of situations" special treatment of the retarded is "not only legitimate but also desirable." *Ante,* at 3257. That assertion suggests the Court would somehow have us calculate the percentage of "situations" in which a characteristic is validly and invalidly invoked before determining whether heightened scrutiny is appropriate. But heightened scrutiny has not been "triggered" in our past cases only after some undefined numerical threshold of invalid "situations" has been crossed. An inquiry into constitutional principle, not mathematics, determines whether heightened scrutiny is appropriate. Whenever evolving principles of equality, rooted in the Equal Protection Clause, require that certain classifications be viewed as *potentially* discriminatory, and when history reveals systemic unequal treatment, more searching judicial inquiry than minimum rationality becomes relevant.

Potentially discriminatory classifications exist only where some constitutional basis can be found for presuming that equal rights are required. Discrimination, in the Fourteenth Amendment sense, connotes a substantive constitutional judgment that two individuals or groups are entitled to be treated equally with respect to something. With regard to economic and commercial matters, no basis for such a conclusion exists, for as Justice Holmes urged the *Lochner* Court, the Fourteenth Amendment was not "intended to embody a particular economic theory...." *Lochner v. New York,* 198 U.S., at 75, 25 S.Ct., at 546 (dissenting). As a matter of substantive policy, therefore, government is free to move in any ***471** direction, or to change directions, [FN22] in the economic and commercial ****3271** sphere. [FN23] The structure of economic and commercial life is a matter of political compromise, not constitutional principle, and no norm of equality requires that there be as many opticians as optometrists, see *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), or new businesses as old, see *New Orleans v. Dukes,* 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

> FN22. Constitutional provisions other than the Equal Protection Clause, such as the Contracts Clause, the Just Compensation Clause, or the Due Process Clause, may constrain the extent to which government can upset settled expectations

when changing course and the process by which it must implement such changes.

FN23. Only when it can be said that "Congress misapprehended what it was doing," *United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 193, 101 S.Ct. 453, 469, 66 L.Ed.2d 368 (1980) (BRENNAN, J., dissenting), will a classification fail the minimal rational-basis standard. Even then, the classification fails not because of limits on the directions which substantive policy can take in the economic and commercial area, but because the classification reflects *no* underlying substantive policy--it is simply arbitrary.

But the Fourteenth Amendment does prohibit other results under virtually all circumstances, such as castes created by law along racial or ethnic lines, see *Palmore v. Sidoti,* 466 U.S., at 432-433, 104 S.Ct., at 1881-1882; *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964); *Shelley v. Kraemer,* 334 U.S. 1, 23, 68 S.Ct. 836, 847, 92 L.Ed. 1161 (1948) ; *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), and significantly constrains the range of permissible government choices where gender or illegitimacy, for example, are concerned. Where such constraints, derived from the Fourteenth Amendment, are present, and where history teaches that they have systemically been ignored, a "more searching judicial inquiry" is required. *United States v. Carolene Products Co.,* 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 784 n. 4, 82 L.Ed. 1234 (1938).

That more searching inquiry, be it called heightened scrutiny or "second order" rational-basis review, is a method of ***472** approaching certain classifications skeptically, with judgment suspended until the facts are in and the evidence considered. The government must establish that the classification is substantially related to important and legitimate objectives, see, *e.g., Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), so that valid and sufficiently weighty policies actually justify the departure from equality. Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day. By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment. Where classifications based on a particular characteristic have done so in the past, and the threat that they may do so remains, heightened scrutiny is appropriate. [FN24]

FN24. No single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny; experience, not abstract logic, must be the primary guide. The "political powerlessness" of a group may be relevant, *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973), but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates. Minors cannot vote and thus might be considered politically powerless to an extreme degree. Nonetheless, we see few statutes reflecting prejudice or indifference to minors, and I am not aware of any suggestion that legislation affecting them be viewed with the suspicion of heightened scrutiny. Similarly, immutability of the trait at issue may be relevant, but many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances. See *ante,* at 3256, n. 10. The political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs. Statutes discriminating against the young have not been common nor need be feared because those who do vote and

> legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.
>
> The discreteness and insularity warranting a "more searching judicial inquiry," *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 784 n. 4, 82 L.Ed. 1234 (1938), must therefore be viewed from a social and cultural perspective as well as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963 (1921) (Holmes, J.).

***473 **3272** As the history of discrimination against the retarded and its continuing legacy amply attest, the mentally retarded have been, and in some areas may still be, the targets of action the Equal Protection Clause condemns. With respect to a liberty so valued as the right to establish a home in the community, and so likely to be denied on the basis of irrational fears and outright hostility, heightened scrutiny is surely appropriate.

IV

In light of the scrutiny that should be applied here, Cleburne's ordinance sweeps too broadly to dispel the suspicion that it rests on a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community. The Court, while disclaiming that special scrutiny is necessary or warranted, reaches the same conclusion. Rather than striking the ordinance down, however, the Court invalidates it merely as applied to respondents. I must dissent from the novel proposition that "the preferred course of adjudication" ***474** is to leave standing a legislative Act resting on "irrational prejudice" *ante,* at 3260, thereby forcing individuals in the group discriminated against to continue to run the Act's gauntlet.

The Court appears to act out of a belief that the ordinance might be "rational" as applied to some subgroup of the retarded under some circumstances, such as those utterly without the capacity to live in a community, and that the ordinance should not be invalidated *in toto* if it is capable of ever being validly applied. But the issue is not "whether the city may never insist on a special use permit for the mentally retarded in an R-3 zone." *Ante,* at 3258. The issue is whether the city may require a permit pursuant to a blunderbuss ordinance drafted many years ago to exclude all the "feeble-minded," or whether the city must enact a new ordinance carefully tailored to the exclusion of some well-defined subgroup of retarded people in circumstances in which exclusion might reasonably further legitimate city purposes.

By leaving the sweeping exclusion of the "feebleminded" to be applied to other groups of the retarded, the Court has created peculiar problems for the future. The Court does not define the relevant characteristics of respondents or their proposed home that make it unlawful to require them to seek a special permit. Nor does the Court delineate any principle that defines to which, if any, set of retarded people the ordinance *might* validly be applied. Cleburne's City Council and retarded applicants are left without guidance as to the potentially valid, and invalid, applications of the ordinance. As a consequence, the Court's as-applied remedy relegates future retarded applicants to the standardless discretion of low-level officials who have already shown an all too willing readiness to be captured by the "vague, undifferentiated fears," *ante,* at 3259, of ignorant or frightened residents.

Invalidating on its face the ordinance's special treatment of the "feebleminded," in contrast, would place the responsibility for tailoring and updating Cleburne's unconstitutional *475 ordinance where it belongs: **3273 with the legislative arm of the City of Cleburne. If Cleburne perceives a legitimate need for requiring a certain well-defined subgroup of the retarded to obtain special permits before establishing group homes, Cleburne will, after studying the problem and making the appropriate policy decisions, enact a new, more narrowly tailored ordinance. That ordinance might well look very different from the current one; it might separate group homes (presently treated nowhere in the ordinance) from hospitals, and it might define a narrow subclass of the retarded for whom even group homes could legitimately be excluded. Special treatment of the retarded might be ended altogether. But whatever the contours such an ordinance might take, the city should not be allowed to keep its ordinance on the books intact and thereby shift to the courts the responsibility to confront the complex empirical and policy questions involved in updating statutes affecting the mentally retarded. A legislative solution would yield standards and provide the sort of certainty to retarded applicants and administrative officials that case-by-case judicial rulings cannot provide. Retarded applicants should not have to continue to attempt to surmount Cleburne's vastly overbroad ordinance.

The Court's as-applied approach might be more defensible under circumstances very different from those presented here. Were the ordinance capable of being cleanly severed, in one judicial cut, into its permissible and impermissible applications, the problems I have pointed out would be greatly reduced. Cf. *United States v. Grace,* 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (statute restricting speech and conduct in Supreme Court building and on its grounds invalid as applied to sidewalks); but cf. *id.,* at 184-188 (opinion concurring in part and dissenting in part). But no readily apparent construction appears, nor has the Court offered one, to define which group of retarded people the City might validly require a permit of, and which it might not, in the R-3 zone. The Court's as-applied holding is particularly inappropriate here, *476 for nine-tenths of the group covered by the statute appears similarly situated to respondents, see *ante,* at 3256, n. 9--a figure that makes the statutory presumption enormously overbroad. Cf. *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (invalidating statutory presumption despite State's insistence that it validly applied to "most" of those covered).

To my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis. When statutes rest on impermissibly overbroad generalizations, our cases have invalidated the presumption on its face. [FN25] We do not instead leave to the courts the task **3274 of redrafting the statute through an ongoing and cumbersome process of "as applied" constitutional rulings. In *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974), for *477 example, we invalidated, *inter alia,* a maternity leave policy that required pregnant schoolteachers to take unpaid leave beginning five months before their expected due date. The school board argued that some teachers became physically incapable of performing adequately in the latter stages of their pregnancy, and we accepted this justification for purposes of our decision. Assuming the policy might validly be applied to some teachers, particularly in the last few weeks of their pregnancy, *id.,* at 647, n. 13, 94 S.Ct., at 799, n. 13, we nonetheless invalidated it *in toto,* rather than simply as applied to the particular plaintiff. The Court required school boards to employ "alternative administrative means" to achieve their legitimate health and safety goal, *id.,* at 647, 94 S.Ct., at 800, or the legislature to enact a more carefully tailored statute, *id.,* at 647, n. 13, 94 S.Ct., at 799, n. 13.

> FN25. The Court strongly suggests that the loose fit of the ordinance to its purported objectives signifies that the ordinance rests on an "irrational prejudice," *ante,* at 3260, an unconstitutional legislative purpose. See *Mississippi University for Women v. Hogan,* 458 U.S., at 725, 102 S.Ct., at 3336. In that event, recent precedent should make clear that the ordinance must, in its entirety, be invalidated. See *Hunter v. Underwood,* 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985). *Hunter*

> involved a 1902 constitutional provision disenfranchising various felons. Because that provision had been motivated, at least in part, by a desire to disenfranchise Negroes, we invalidated it on its face. In doing so, we did not suggest that felons could not be deprived of the vote through a statute motivated by some purpose other than racial discrimination. See *Richardson v. Ramirez,* 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974). Yet that possibility, or the possibility that the provision might have been only partly motivated by the desire to disenfranchise Negroes, did not suggest the provision should be invalidated only "as applied" to the particular plaintiffs in *Hunter* or even as applied to Negroes more generally. Instead we concluded:
>
> "Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights* [*v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)]." 471 U.S., at 233, 105 S.Ct., at 1922. If a discriminatory purpose infects a legislative Act, the Act itself is inconsistent with the Equal Protection Clause and cannot validly be applied to anyone.

Similarly, *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979), invalidated a law that required parental consent to adoption from unwed mothers but not from unwed fathers. This distinction was defended on the ground, *inter alia,* that unwed fathers were often more difficult to locate, particularly during a child's infancy. We suggested the legislature might make proof of abandonment easier or proof of paternity harder, but we required the legislature to draft a new statute tailored more precisely to the problem of locating unwed fathers. The statute was not left on the books by invalidating it only as applied to unwed fathers who actually proved they could be located.

When a presumption is unconstitutionally overbroad, the preferred course of adjudication is to strike it down. See also *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *Stanley v. Illinois, supra; Vlandis v. Kline,* 412 U.S. 441, 453-454, 93 S.Ct. 2230, 2237, 37 L.Ed.2d 63 (1973); *Carrington v. Rash,* 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); *Sugarman v. Dougall,* 413 U.S. 634, 646- 649, 93 S.Ct. 2842, 2849-2851, 37 L.Ed.2d 853 (1973); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); *Levy v. Louisiana,* 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968).

In my view, the Court's remedial approach is both unprecedented in the equal protection area and unwise. This doctrinal ***478** change of course was not sought by the parties, suggested by the various *amici,* or discussed at oral argument. Moreover, the Court does not persuasively reason its way to its novel remedial holding nor reconsider our prior cases directly on point. Instead, the Court simply asserts that "this is the preferred course of adjudication." Given that this assertion emerges only from today's decision, one can only hope it will not become entrenched in the law without fuller consideration.

V

The Court's opinion approaches the task of principled equal protection adjudication in what I view as precisely the wrong way. The formal label under which an equal protection claim is reviewed is less important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one. Yet in focusing obsessively on the appropriate label to give its standard of review, the Court fails to identify the interests at stake or to articulate the principle that classifications based on mental retardation must be carefully examined to assure they do not rest on impermissible assumptions or false stereotypes regarding individual ability and need. No guidance is thereby given as to when the Court's freewheeling, and potentially dangerous, "rational-basis standard" is to be employed, nor is attention directed to the invidiousness of grouping all retarded individuals together. Moreover, the Court's narrow, as-applied remedy fails to deal

adequately **3275 with the overbroad presumption that lies at the heart of this case. Rather than leaving future retarded individuals to run the gauntlet of this overbroad presumption, I would affirm the judgment of the Court of Appeals in its entirety and would strike down on its face the provision at issue. I therefore concur in the judgment in part and dissent in part.

Briefs and Other Related Documents (Back to top)

• 1985 WL 668981 (Appellate Brief) Petitioners' Reply Brief (Mar. 07, 1985)

• 1985 WL 669793 (Appellate Brief) Petitioners' Reply Brief (Mar. 07, 1985)

• 1985 WL 669792 (Appellate Brief) Objections of Petitioners to Motions of Disability Rights Education and Defense Fund, Inc., National Association for Rights Protection and Advocacy, et al., National Conference of Catholic Charities, et al., American Civil Liberties Union Foundation, et al., American Association on Mental Deficiency, et al., Association for Retarded Citizens/USA, et al., Disabled Peoples' International and Human Rights Advocates, Inc., for Leave to File Briefs as Amici Curiae (Feb. 11, 1985)

• 1985 WL 668987 (Appellate Brief) Amicus Curiae Brief for the State of Texas and the Texas Department of Mental Health and Mental Retardation (Feb. 02, 1985)

• 1985 WL 669787 (Appellate Brief) Motion for Permission to File Brief Amicus Curiae and Brief for the National Conference of Catholic Charities, National Association of Protection and Advocacy Systems Inc., National Association of Private Residential Facilities for the Mentally Retar ded, Inc., National Rehabilitation Association, International League of Societies for Persons with Mental Handicap, and Texas Association of Private ICF/MR Providers, Inc. (Feb. 02, 1985)

• 1985 WL 669791 (Appellate Brief) Motion and Brief Amici Curiae of Association for Retarded Citizens/USA Association for Retarded Citizens/Texas National Down Syndrome Congress People First International and People First Organizations of Iowa, Louisiana, Michigan, Nebraska, Oregon an d Washington United Together S.T.A.N.D. Together Speaking for Ourselves Consumer Advocacy Board of the Massachusetts Association for Retarded Citizens Texas Advocates Wisconsin Advocates Capitol People First Self-Advocates of Central New York (Feb. 02, 1985)

• 1985 WL 668980 (Appellate Brief) Brief for Respondents (Feb. 01, 1985)

• 1985 WL 668983 (Appellate Brief) Amicus Curiae Brief of the State of Connecticut, Joined by the States of Arkansas, California, Colorado, Illinois, Louisiana, North Dakota, Rhode Island, Tennessee and West Virginia in Support of the Respondents (Feb. 01, 1985)

• 1985 WL 668984 (Appellate Brief) Brief for the State of Maryland as Amicus Curiae in Support of Respondents (Feb. 01, 1985)

• 1985 WL 669783 (Appellate Brief) Brief for the State of Maryland as Amicus Curiae in Support of Respondents (Feb. 01, 1985)

• 1985 WL 669784 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief of American Association on Mental Deficiency, the Association for Persons with Severe Handicaps, American Psychological Association, American Psychiatric Association, American Orthopsychiatric As sociation, American Association of University Affiliated Programs for the Developmentally Disabled, and the Council for Exceptional Children as Amici Curiae in Support of Respondents (Feb. 01, 1985)

• 1985 WL 669785 (Appellate Brief) Brief for Respondents (Feb. 01, 1985)

• 1985 WL 669786 (Appellate Brief) Amicus Curiae Brief of the State of Connecticut, Joined by the States of Arkansas, California, Colorado, Illinois, Louisiana, North Dakota, Rhode Island, Tennessee and West Virginia in Support of the Respondents (Feb. 01, 1985)

• 1985 WL 669788 (Appellate Brief) Motion to File Brief Amicus Curiae and Brief of Amicus Curiae, Disability Rights Education and Defense Fund in

Support of Respondent (Feb. 01, 1985)

• 1985 WL 669789 (Appellate Brief) Motion for Leave to File Brief Amici Curiae and Brief of the American Civil Liberties Union Foundation, the New York Civil Liberties Union, the American Civil Liberties Union Foundation of Southern California, and the American Civil Liberties Foundat ion of Texas as Amici Curiae in Support of Respondents (Feb. 01, 1985)

• 1985 WL 669790 (Appellate Brief) Amicus Curiae Brief for the State of Texas and the Texas Department of Mental Health and Mental Retardation (Feb. 01, 1985)

• 1985 WL 668985 (Appellate Brief) Brief on Behalf of Pennsylvania, Iowa, Michigan, Minnesota, New Hampshire, New Jersey, Ohio and Wisconsin, Amici Curiae (Jan. 29, 1985)

• 1985 WL 669782 (Appellate Brief) Brief on Behalf of Pennsylvania, Iowa, Michigan, Minnesota, New Hampshire, New Jersey, Ohio and Wisconsin, Amici Curiae (Jan. 29, 1985)

• 1985 WL 668982 (Appellate Brief) Brief for the United States as Amicus Curiae Supporting Reversal (Jan. 02, 1985)

• 1985 WL 669781 (Appellate Brief) Brief for the United States as Amicus Curiae Supporting Reversal (Jan. 02, 1985)

• 1984 WL 565889 (Appellate Brief) Amicus Curiae Brief by the Federation of Greater Baton Rouge Civic Associations, Inc. (Dec. 31, 1984)

• 1984 WL 565582 (Appellate Brief) Brief for Petitioners (Dec. 24, 1984)

• 1984 WL 565888 (Appellate Brief) Brief for Petitioners (Dec. 24, 1984)

• 1984 WL 565887 (Appellate Brief) Reply Brief for Petitioners (Nov. 05, 1984)

• 1984 WL 565890 (Appellate Brief) Motion for Leave to File Brief Amici Curiae and Brief for Disabled Peoples' International and Human Rights Advocates, Inc. (Oct. Term 1984)

• 1984 WL 565891 (Appellate Brief) Motion for Leave to File a Brief Amici Curiae and Amici Curiae Brief of The National Association for Rights Protection and Advocacy; The Normalization Safeguards Project; The Foundation for Dignity; The Brums Foundation; and the Plaintiffs in: Brewst er v. Dukakis (D. Mass.); Connecticut Association for Retarded Citizens v. Thorne (D. Conn.); E.H. v. Martin (W.Va. Sup. Ct.); Garrity v. Sununu (D.N.H.); Gustafson v. Mahoney (D. Mass.); Halderman v. Pennhurst (E.D. Pa.); Isomone v. Garrahy (D.R.I. (Oct. Term 1984)

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2004 WL 2414419
--- F.Supp.2d ---
(Cite as: 2004 WL 2414419 (N.D.Fla.))

C
Motions, Pleadings and Filings

United States District Court, N.D. Florida,
Tallahassee Division.

The FLORIDA DEMOCRATIC PARTY, Plaintiff,
v.
Glenda E. HOOD, etc., et al., Defendants.

No. 4:04CV395TH/WCS.

Oct. 21, 2004.

Background: Political party sued State of Florida, seeking preliminary injunction barring election workers from denying provisional ballots to prospective voters believed to not be registered at polling place.

Holdings: The District Court, Hinkle, J., held that:
(1) Help America Vote Act (HAVA) conferred right to vote enforceable under § 1983;
(2) party had standing to sue on behalf of voters who would be denied right to cast provisional ballots;
(3) HAVA did not require that ballots cast in wrong precincts be counted;
(4) HAVA did require that voters believing they were registered be given opportunity to cast provisional ballots, subject to disallowance if voters were wrong; and
(5) requirements for issuance of preliminary injunction requiring distribution of provisional ballots were satisfied.
Injunction issued.

[1] Civil Rights ⇐1029
78k1029 Most Cited Cases
Help America Vote Act (HAVA) conferred right to vote in federal election, enforceable under § 1983. 42 U.S.C.A. §§ 1983, 15482.

[1] Elections ⇐8.1
144k8.1 Most Cited Cases
Help America Vote Act (HAVA) conferred right to vote in federal election, enforceable under § 1983. 42 U.S.C.A. §§ 1983, 15482.

[2] Elections ⇐223
144k223 Most Cited Cases
Political party had standing to bring suit against State of Florida, challenging interpretation of Help America Vote Act (HAVA) provision under which election workers could deny prospective voter right to cast provisional ballot if workers believed voter was not registered to vote at that polling place; party could represent voters at risk to be denied right to vote due to mistaken interpretation of HAVA, as identities would not be known until election day, when it would be too late to rectify errors arising from erroneous interpretation. 42 U.S.C.A. § 15482.

[3] Elections ⇐223
144k223 Most Cited Cases
Help America Vote Act (HAVA) provision, requiring that prospective voters, whose right to vote was challenged by election voters on grounds they were not registered at that precinct, be allowed to cast provisional ballot, did not further require that ballot be counted, when state law provided that voters must vote in precincts where they were registered. 42 U.S.C.A. § 15482(a)(4); West's F.S.A. §§ 101.048, 101.049.

[4] Elections ⇐223
144k223 Most Cited Cases
Help America Vote Act (HAVA) required that prospective voters be allowed opportunity to cast provisional ballots, despite determinations by election workers that voters were attempting to vote at wrong polling place. 42 U.S.C.A. § 15482(a)(4); West's F.S.A. §§ 101.048, 101.049.

[5] Injunction ⇐138.51
212k138.51 Most Cited Cases
Preliminary injunction would be issued barring Florida election officials from denying prospective voters claiming they were registered to vote at particular polling place opportunity to cast provisional ballot, subject to disqualification if prospective voters were not registered; prospective voters were likely to prevail on merits of claim that

provisional ballot was required under Help America Vote Act (HAVA), prospective voters would be irreparably injured by impossibility of casting vote at later time, voter injury would outweigh harm to state, and public interest was served by having voting rights protected from administrative errors. 42 U.S.C.A. § 15482(a)(4); West's F.S.A. §§ 101.048, 101.049.

Alan Harold Fein, Christopher L. Barnett, Stearns Weaver Miller Etc, Miami, FL, for Plaintiff.

George N Meros, Jr., Grayrobinson PA, Jonathan Alan Glogau, Attorney General, Tallahassee, FL, for Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

ROBERT L. HINKLE, Chief District Judge.

*1 In this action plaintiff asserts that a prospective voter in a federal election has a right under federal law (1) to cast a provisional ballot at a polling place even if local officials assert that the voter is at the wrong polling place, and (2) to have that ballot counted, even if the voter is in fact at the wrong polling place, if the voter meets all requirements of state law other than the requirement to vote at the proper polling place. Plaintiff has moved for a preliminary injunction requiring the defendant election officials of the State of Florida to afford voters these rights in the November 2004 election. I conclude that plaintiff is likely to prevail on the merits with respect to the first claimed right but unlikely to prevail with respect to the second. I conclude further that plaintiff has met the other prerequisites to issuance of a preliminary injunction. I thus grant the motion for preliminary injunction in part. [FN1]

I
Background

The Florida Democratic Party brought this action against the Florida Secretary of State and Director of the Division of Elections in their official capacities. These are the state officials with ultimate responsibility for conducting the November 2004 election in Florida. On the ballot will be elections for President, United States Senate, and United States House of Representatives, as well as numerous state and local offices and proposed constitutional amendments.

Plaintiff seeks relief under a section of the Help America Vote Act ("HAVA"), 42 U.S.C. § 15482, that gives voters in federal elections a right to cast "provisional" ballots. Provisional ballots are cast by persons who assert they are eligible to vote but who are determined on the spot by election workers to be ineligible. Each provisional ballot is kept in a separate envelope and counted only if it is ultimately determined that the voter was in fact eligible to vote. What it means to be "eligible" for these purposes is one of the issues in this litigation.

As required by § 15482, as well as by Florida Statutes §§ 101.048 and 101.049 (2003), defendants have established a system for provisional voting. Plaintiff asserts, however, that defendants' system violates HAVA because it does not allow provisional voting other than in the voter's assigned precinct. [FN2]

Under long-established Florida law, each voter is assigned to a precinct and may vote on election day only at the polling place for that precinct. [FN3] Defendants have announced that a provisional vote will be counted only if the voter casts the ballot at the proper polling place. [FN4] Further, defendants have issued an instructional manual telling poll workers not to allow a voter to cast a provisional ballot if the poll workers determine that the voter is at the *wrong* polling place. [FN5]

By its complaint in this action, plaintiff seeks declaratory and injunctive relief. Plaintiff asserts that a prospective voter in a federal election has a right under federal law to cast a provisional ballot, and to have that ballot counted, without regard to state law requiring that votes be cast only at an assigned polling place. Plaintiff has moved for a preliminary injunction.

*2 Defendants initially contested both a voter's right to cast a ballot at a polling place believed by election workers to be the wrong polling place, and a voter's right to have such a ballot counted. During the hearing on plaintiff's motion for preliminary injunction and in response to questioning by the court, however, defendants withdrew their assertion that a voter cannot properly cast a provisional ballot

if election workers conclude at that time that the voter is at the wrong polling place. Instead, defendants now concede that a voter must be allowed to cast a provisional ballot if the voter makes the declaration and written attestation required by federal law, even if election workers conclude the voter is at the wrong polling place. Defendants now have so advised the various county supervisors of elections by means of a memorandum explicitly supplementing the relevant provisions of the instructional manual. Defendants remain adamant, however, that a provisional ballot cannot properly be counted unless the voter was, in fact, at the correct polling place.

Defendants also defend this action, and resist issuance of a preliminary injunction, on the ground that HAVA's section on provisional voting creates no federal "right" and thus cannot be enforced in a private action under § 1983, and on the ground that plaintiff lacks standing to assert the rights of anyone to whom injury resulting from the actions at issue is more than a speculative possibility.

II
Preliminary Injunction Standards

As both sides agree, issuance of a preliminary injunction is governed by a familiar four-part test. The proponent must establish (1) a substantial likelihood of success on the merits; (2) that the proponent will suffer irreparable injury unless the injunction issues; (3) that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction would not be adverse to the public interest. *McDonald's Corp. v. Robertson,* 147 F.3d 1301, 1306 (11th Cir.1998); *U.S. v. Lambert,* 695 F.2d 536 (11th Cir.1983).

Likelihood of success on the merits, in the context of this case, refers both to the substantive issues under HAVA and also to the questions of whether plaintiff has standing and may maintain a private right of action for enforcement of HAVA under § 1983.

III
The Statute

Congress enacted HAVA at least partly in response to perceived voting irregularities in the State of Florida during the November 2000 presidential election. *See* 148 Cong. Rec. S10488-02 (2002) (discussing the "flaws and failures of our election machinery" as showcased in the 2000 election). Among the perceived irregularities was that eligible voters had been removed from Florida voting rolls in the erroneous belief that they were convicted felons whose right to vote had not been restored. At the time of the November 2000 election, Florida law did not allow the casting of a ballot by a person who presented at a polling place on election day but who was determined by election officials at that time not to be eligible to vote. If the determination that the voter was not eligible later turned out to be erroneous, the problem could not be cured. Those turned away from the polls during the November 2000 election, even erroneously, thus had no opportunity to vote. Many other states also made no provision for the casting of a ballot by a person determined on the spot to be ineligible to vote.

***3** HAVA dealt with this problem by creating a system for provisional balloting, that is, a system under which a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote. The statute provides in relevant part:

(a) Provisional voting requirements
If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:
(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.
(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is--
(A) a registered voter in the jurisdiction in which the individual desire to vote; and
(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).
(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that *the individual is eligible under State law to vote,* the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

42 U.S.C. § 15482 (emphasis added).

HAVA also requires state or local elections officials to post specified information at each polling place, including "information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated." 42 U.S.C. § 15482(b)(2)(E).

IV
Enforcement under § 1983

[1] HAVA does not itself create a private right of action. Plaintiff claims, however, that HAVA creates a federal "right," and that that right may be enforced against state officials under 42 U.S.C. § 1983. I agree.

The law applicable to this issue is set forth in a line of cases recently summarized in *Schwier v. Cox,* 340 F.3d 1284 (11th Cir.2003). *See, e.g., Gonzaga University v. Doe,* 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); *Blessing v. Freestone,* 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997); *Wilder v. Virginia Hospital Assn.,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). The inquiry begins with the question whether "Congress intended to create a federal right," *Schwier,* 340 F.3d at 1290, *quoting Gonzaga,* 536 U.S. at 283, because § 1983 creates a cause of action for deprivation of "rights" (as well as "privileges" and "immunities") arising under federal law.

***4** The relevant section of HAVA clearly evinces a congressional intention to create a federal right. Indeed, that is the whole point of the provision. And the various factors courts have cited as aids in analyzing this issue all cut in favor of recognizing a federal right. Thus HAVA speaks directly of individual voters, not just of actions required of elections officials, and HAVA even refers explicitly to the "right" of voters to cast a provisional ballot. *See* 42 U.S.C. § 15482(b)(2)(E). There is nothing precatory about the statute; Congress clearly imposed a mandate. And the mandate is one that is readily subject to judicial interpretation and enforcement, much like the many other rights that are the subject of litigation in federal courts every day. Finally, although HAVA has other enforcement mechanisms, they are not inconsistent in any respect with the availability of relief under § 1983. In sum, under *Schwier* and the line of cases it interpreted, this statute clearly creates a federal right enforceable under § 1983.

That this is correct becomes even more clear when one steps back from the doctrinal wrangling and precise language of the cases and takes a longer view. Protecting federal rights of this type from state interference is very close to the core of § 1983 and indeed very close to one of the most critical components of federal jurisdiction. But for the ability to enforce federal rights against state interference in actions under § 1983, the schools might still be segregated. *See generally Monell v. Dep't of Social Servs.,* 436 U.S. 658, 685, 98 S.Ct. 2018, 2033, 56 L.Ed.2d 611 (1978) (summarizing Congress's lengthy discussion before passing § 1983 of intent "to give a broad remedy for violations of federally protected civil liberties"). Congress sought to protect the right to vote by adopting the provisional voting section of HAVA. [FN6]

V
Standing

[2] Plaintiff is a political party. It claims standing to assert its own rights as a political party and also the rights of its candidates and voters. In appropriate circumstances, an association or organization has standing to assert claims based on injuries to itself *or* its members. *See United Food and Commercial Workers v. Brown Group,* 517 U.S. 544, 116 S.Ct. 1529, 134 L.Ed.2d 758(1996). In either case, the organization or the members must be affected in a tangible way. *See id.*

Thus, for example, an organization has standing to challenge conduct that impedes its ability to attract members, to raise revenues, or to fulfill its purposes. *See Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214(1982). And, in appropriate circumstances, an organization can challenge conduct that injures its members. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) ("we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit"); *International Union, UAW v. Brock,* 477 U.S. 274, 289, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986); *Doe v. Stincer,* 175 F.3d 879 (11th Cir.1999).

***5** Under these principles, plaintiff has standing to assert, at least, the rights of its members who will vote in the November 2004 election. Plaintiff has not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance. Thus a voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place. It is inevitable, however, that there will be such mistakes. The issues plaintiff raises are not speculative or remote; they are real and imminent. *See White's Place, Inc. v. Glover,* 222 F.3d 1327 (11th Cir.2000) (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). Plaintiff has standing to pursue this litigation.

VI
Merits: Counting Votes Cast at the Wrong Polling Place

[3] Plaintiff does not fare as well, however, on the merits. Florida law has long required voting at the proper polling place, and nothing in HAVA invalidates that approach. The purpose of HAVA's provisional voting section is not to eliminate precinct voting, but instead to ensure that voters are allowed to vote (and to have their votes counted) when they appear at the proper polling place and are otherwise eligible to vote. In the November 2000 election, this did not always occur, because voters who appeared at the proper polling place were sometimes turned away in error, including, for example, as a result of the removal of an eligible voter from the voting rolls based on a mistaken determination that he or she was a convicted felon whose rights had not been restored.

HAVA's provisional voting section in effect adopts a "perfect knowledge" approach. If a person presents at a polling place and seeks to vote, and if that person would be allowed to vote by an honest election worker with perfect knowledge of the facts and law, then the person's vote should count. The difficulty, of course, is that when the person presents, the election worker may not have perfect knowledge; the facts are not always at hand. It is this difficulty that provisional voting seeks to address. The person who claims eligibility to vote, but whose eligibility to vote at that time and place cannot be verified, is entitled under HAVA to cast a provisional ballot. On further review--when, one hopes, perfect or at least more perfect knowledge will be available--the vote will be counted or not, depending on whether the person was indeed entitled to vote at that time and place. It is as simple as that.

This reading is consistent in all respects with the language of the statute. One and only one subsection of the statute addresses the issue of whether a provisional ballot will be counted. That subsection provides:

> ***6** If the appropriate State or local election official ... [ultimately] determines that *the individual is eligible under State law to vote,* the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

42 U.S.C. § 15482(a)(4) (emphasis added). The emphasized language could mean the vote counts if "the individual is eligible under State law to vote *in this election at some polling place,*" or the language could mean the vote counts only if "the individual is eligible under State law to vote *in this election at this polling place.*" Either reading is consistent with

the language of the statute, but the latter reading is more appropriate because it requires the vote to be counted "in accordance with State law," words that Congress chose to include in the statute, perhaps in recognition of this very issue. Moreover, only this reading comports with the statute's purpose, as set forth above. And finally, only this reading comports with the statute's remarkably clear and consistent legislative history. [FN7]

In asserting the contrary, plaintiff says "eligible to vote" can only mean eligible to vote in this election, without regard to any specific polling place, because, plaintiff says, this is the plain meaning of "eligible." But there is nothing plain or unambiguous about this use of the word "eligible." To the contrary, "eligible" could mean any of several things. In one sense, any 18-year-old citizen of Florida is "eligible" to vote in the state's elections. As even plaintiff admits, however, such a person cannot vote unless he or she has duly registered to vote, and has done so at least 30 days in advance, as required by Florida law. HAVA certainly does *not* require the counting of the vote of an unregistered voter, or one who registers too late. So "eligible" as used in this subsection necessarily includes at least some element of compliance with applicable state procedures. Nothing in the "plain language" of the term "eligible" answers the question whether the term means eligible to vote at the particular polling place, or only eligible to vote somewhere.

Plaintiff also emphasizes references in other parts of the statute to whether the provisional voter is a "registered voter in the jurisdiction," "eligible to vote in an election for Federal office," or "eligible to vote in that election." 42 U.S.C. § 15482(a) & (a)(2)(B). As plaintiff notes, these phrases do not seem to include any restriction based on polling place. These phrases do not, however, appear in the subsection that addresses whether a vote will count. Instead, these phrases appear in the subsections addressing whether a voter may submit a provisional ballot at all--a ballot that might or might not be counted, depending only on whether the voter is "eligible under State law to vote." 42 U.S.C. § 15482(a)(4). Plaintiff's assertion that there can be no difference between who may submit a provisional ballot, on the one hand, and whose ballot will count, on the other hand, is incorrect; the whole point of provisional balloting is that the vote may be cast but ultimately may or may not count. It is entirely reasonable to attribute to Congress a determination to make it easy to submit a provisional ballot to safeguard whatever right the voter had, but to leave to preexisting state law the question of whether the ballot should count, based on whatever the facts might ultimately turn out to be. That is what Congress did.

*7 Defendants thus are correct when they assert HAVA does not require the counting of provisional ballots (or any other ballots) cast at the wrong polling place. [FN8]

VII
Merits: Casting a Provisional Ballot

[4] Defendants are incorrect, however, in asserting that a person can be denied the right to cast a provisional ballot based on an on-the-spot determination by election workers that the person is at the wrong polling place. Election workers, like all of us, make mistakes, and the voting rolls are not infallible. That is why provisional balloting exists. The assumption implicit in defendants' original instructional manual--that election workers could never make a mistake when they conclude a voter is at the wrong polling place--cannot be squared with HAVA's provisional voting mandate. As defendants now concede, a person who meets the statutory prerequisites to casting a provisional ballot, by making the required declaration and executing the required affirmation, must be allowed to cast a provisional ballot. The ballot will count only if the person was indeed "eligible under State law to vote" in this election at this polling place. [FN9]

VIII
Remaining Prerequisites to Preliminary Injunction

[5] Beyond a substantial likelihood of success on the merits, the proponent of a preliminary injunction must establish that the proponent will suffer irreparable injury unless the injunction issues; that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; and that the injunction would not be adverse to the public interest. Plaintiff easily meets these requirements in the case at bar.

A person who is denied the right to vote suffers irreparable injury. One need look no further than the 2000 election to confirm that that is so. There was post-election litigation seeking to reopen the polls or otherwise allow further voting by those who had been turned away, but that litigation went nowhere. The problem was irremediable. *See, e.g., Nat'l Coalition for Students with Disabilities v. Bush,* No: 4:00cv442 (Docket) (N.D.Fla. Nov. 29, 2000) (denying motion for order requiring state elections officials to allow voting in November 2000 election, after polls had closed, by persons who claimed they were prevented from voting by violations of federal law); *Dickens v. Florida,* No: 4:00cv420 (Docket) (N.D.Fla. Nov. 9, 2000) (same).

This irreparable injury to a voter is easily sufficient to outweigh any harm defendants may suffer from a narrow preliminary injunction requiring them to allow a person who asserts he or she is at the correct polling place to cast a provisional ballot. Indeed, such a preliminary injunction will injure defendants not at all; they already have acquiesced in the assertion that any such person is entitled to cast a provisional ballot, and already have taken steps to ensure that that will occur. [FN10]

And finally, the public interest favors issuance of such an injunction. It is in the public interest that each voter's right to vote be protected against administrative errors. That is why HAVA created a right to cast a provisional ballot. With one caveat, addressed below, it is in the public interest to allow a voter to cast a provisional ballot, so that if it ultimately is determined that the voter was indeed entitled to vote as he or she asserted, the vote will count, and the right to vote will not be lost.

***8** The caveat is this. In their manual, defendants first instruct election workers who determine that a voter is at the wrong polling place to direct the voter to the correct polling place. That is not only proper but affirmatively commendable and far superior to simply allowing the voter to cast a provisional ballot. In most instances, the election workers will be correct that the voter is at the wrong polling place, and the vote thus will count only if the voter goes to the proper polling place. Simply accepting provisional ballots from such voters would itself raise grave concerns, of fairness if not also of legality. Nothing in the preliminary injunction that will be issued should be read to restrict in any way the authority of election workers to tell a voter he or she is at the wrong polling place and to direct the voter to the proper polling place. It is only if the voter disagrees--in effect, if the voter insists that he or she is at the correct polling place--that an election worker must allow the voter to cast a provisional ballot.

The revised instructions defendants now have sent to election workers clearly set forth the proper approach, under which poll workers will diligently attempt to determine the correct situation, and, if they determine the voter is at the wrong polling place, will direct the voter to the proper polling place, accepting a provisional ballot only if the fully-informed voter still asserts he or she is in the right place. The preliminary injunction requiring that a voter be allowed to cast a provisional ballot when he or she meets the statutory requirements for doing so, coupled with defendants' instructions setting forth the appropriate handling of the matter by poll workers on the scene, will not disserve the public interest.

IX
Security

Federal Rule of Civil Procedure 65(c) states that no preliminary injunction shall issue

> except upon the giving of security by the applicant in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined....

At the hearings in the case at bar, defendants made no claim they will incur costs or damages as a result of this preliminary injunction, and defendants did not ask that plaintiff be required to post security.

Such costs or damages, if any, would be nominal. The mechanism for accepting provisional ballots is already in place, and defendants can comply (indeed, already have complied) with the preliminary injunction simply by issuing a memorandum.

If defendants assert plaintiff should be required to give security, defendants may file a motion to require the giving of security, including argument and any evidence deemed appropriate on the issue

of the amount of security that should be required. Unless and until defendants file such a motion, defendants will be deemed fully secured, without the filing of security.

Conclusion

***9** Federal law does not invalidate the long-standing requirement in the State of Florida that a voter must vote on election day only at the voter's assigned polling place. Federal law does, however, mandate that any voter who makes a required declaration and written affirmation--essentially asserting the voter's eligibility to vote in the election at issue--must be allowed to cast a provisional ballot. Such a ballot must be counted if and only if the voter was eligible under state law to vote in that election at that polling place. For these reasons,

IT IS ORDERED:

1. Plaintiff's motion for preliminary injunction (document 4) is GRANTED IN PART. Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, shall not refuse to allow the casting of a provisional ballot by any person who presents at a polling place on November 2, 2004, but is determined by election workers to be at the wrong polling place, if the person makes an appropriate declaration and written affirmation in accordance with 42 U.S.C. § 15482(a) & (a)(2). This order does not restrict in any way the authority of election workers to direct such a person to the polling place deemed appropriate; to advise such a person that a provisional ballot cast at the wrong polling place will not be counted; and otherwise to investigate and advise the person with respect to his or her status as a voter.
2. Defendants' motion for judgment on the pleadings (documents 21 and 22) is DENIED.

SO ORDERED this 21st day of October, 2004.

FN1. This order confirms rulings announced on the record and summarizes, without in all instances repeating, the grounds for the rulings.

FN2. Plaintiff also asserts this violates state law, but that is not a claim properly presented here, *see, e.g., Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 121, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (holding that the Eleventh Amendment bars any claim for injunctive relief based on state law against a state or against a state officer in his or her official capacity), and in any event the Florida Supreme Court has definitively rejected plaintiff's reading of Florida law. *See AFL-CIO v. Hood,* No. SC 04-1921 (Fla. Oct. 18, 2004).

FN3. Voters may vote during the two weeks prior to election day at one or more common locations and may cast absentee ballots without regard to precincts. Those options are not involved in the case at bar. On election day, a voter may vote only at the polling place for his or her assigned precinct.

FN4. This is confirmed, for example, by the certificate a voter will be required to sign in order to cast a provisional ballot. That certificate--a form promulgated by defendants--tells voters: "Your ballot will not count if you do not vote in the correct precinct." Complaint (document 1), ex. B, "Provisional Ballot Voter's Certificate."

FN5. Defendants' "Polling Place Procedures Manual" tells poll workers:
Do not allow a voter to vote a provisional ballot if you have determined the voter is registered in another precinct.
Direct the voter to the proper precinct.
Complaint (document 1), ex. A, "Polling Place Procedures Manual" at 7.

FN6. The reference to the old segregation cases is not entirely off the mark. There were claims that the disenfranchisement of voters in the 2000 election in Florida had a disparate racial impact, if it did not also arise from a racial animus. One need not assume those claims were well founded to recognize the appropriateness of providing a federal forum for a fair adjudication of

such claims--or for enforcement of a statute designed in part to prevent the recurrence of circumstances that allowed such claims (well founded or not) to go unresolved.

FN7. For example, a sponsor of the legislation said:
[I]t is inevitable that voters will mistakenly arrive at the wrong polling place. If it is determined by the poll workers that the voter is registered but has been assigned to a different polling place, it is the intent of the authors of this bill that the poll worker can direct the voter to the correct polling place. In most States, the law is specific on the polling place where the voter is to cast his ballot. Again, this bill upholds state law on that subject.
148 Cong. Rec. S10488-02 at S10491 (daily e. Oct. 16, 2002) (statement of Senator Dodd). Later, a senator repeated the point:
This provision is in no way intended to require any State or locality to allow voters to vote from any place other than the polling site where the voter is registered.
at S10493 (statement of Senator Bond). Plaintiff has cited nothing in the legislative history inconsistent with this analysis.

FN8. Since this ruling was announced at the preliminary injunction hearing, other district courts sitting in other states have reached conflicting results on essentially this same issue. *Compare Hawkins v. Blunt,* No: 04-4177-CV-C-RED (W.D.Mo. Oct. 12, 2004) (concluding that HAVA does not require states to count provisional ballots cast at the wrong polling place); *and Colorado Commission Cause v. Davidson,* No: 04cv7709 (D.C.Co. Oct. 20, 2004) (same); *with Sadowsky County Democratic Party v. Blackwell,* No: 304cv7582 (N.D.Ohio Oct. 14, 2004) (concluding that provisional ballots must be counted even if cast in improper precinct); *and Bay County Democratic Party v. Land,* No: 04-10257-BC consolidated with *Michigan State Conference of NAACP v. Land,* No: 04-10267-BC (E.D.Mich. Oct. 19, 2004) (same).

FN9. On this narrow issue--the right of a person to cast a provisional ballot even when determined by poll workers to be at the wrong polling place--plaintiff's standing is at its lowest point. Plaintiff's standing to assert the rights of voters, *see supra* section V, extends only as far as the standing of the voters themselves. It is virtually certain that some voters will appear at the wrong polling place. It is considerably less certain that any voter will be *wrongly determined* to be at the wrong polling place. As a matter of common sense and human experience, it seems likely that such mistakes will occur. I conclude that plaintiff is likely to prevail even on this narrow segment of the standing issue. Before this case is finally addressed on the merits, the actual experience during the November 2004 election may make clear the appropriate resolution of this issue, one way or the other.

FN10. Defendants make no claim that their voluntary compliance with plaintiff's request on this issue renders the matter moot. *See Friends of the Earth, Inc. v. Laidlaw,* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). A "claim for injunctive relief may become moot if: (1) if can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violations." *Dow Jones & Co., Inc. v. Kaye,* 256 F.3d 1251, 1254 (11th Cir.2001). Defendants have distributed a memorandum that, if heeded, will cure the effects of the original instructions prohibiting election workers from allowing the casting of a provisional ballot in these circumstances, but it cannot be said that events have completely and irrevocably eradicated the effects of the original instructions.

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(Cite as: 521 U.S. 702, 117 S.Ct. 2258)

Briefs and Other Related Documents

Supreme Court of the United States

WASHINGTON, et al., Petitioners,
v.
Harold GLUCKSBERG et al.

No. 96-110.

Argued Jan. 8, 1997.
Decided June 26, 1997.

Three terminally ill patients, four physicians, and nonprofit organization brought action against state of Washington for declaratory judgment that statute banning assisted suicide violated due process clause. The United States District Court for the Western District of Washington, Barbara J. Rothstein, Chief Judge, 850 F.Supp. 1454, granted summary judgment for plaintiffs, and state appealed. The Court of Appeals, Noonan, Circuit Judge, 49 F.3d 586, reversed. On rehearing en banc, the Court of Appeals, Reinhardt, Circuit Judge, 79 F.3d 790, affirmed, and physicians petitioned for writ of certiorari. The Supreme Court, Chief Justice Rehnquist, held that: (1) asserted right to assistance in committing suicide was not fundamental liberty interest protected by due process clause, and (2) Washington's ban on assisted suicide was rationally related to legitimate government interests.

Reversed and remanded.

Justice O'Connor filed concurring opinion, in which Justice Ginsburg and Justice Breyer joined in part.

Justices Stevens, Souter, Ginsburg and Breyer filed separate concurring opinions.

For concurring opinions of O'Connor, Stevens, Ginsburg and Breyer see 117 S.Ct. 2302.

West Headnotes

[1] Constitutional Law ⇐251
92k251 Most Cited Cases
[1] Constitutional Law ⇐254.1
92k254.1 Most Cited Cases
Due process clause guarantees more than fair process, and "liberty" it protects includes more than absence of physical restraint. U.S.C.A. Const.Amends. 5, 14.

[2] Constitutional Law ⇐252.5
92k252.5 Most Cited Cases
[2] Constitutional Law ⇐254.1
92k254.1 Most Cited Cases
Due process clause provides heightened protection against government interference with certain fundamental rights and liberty interests. U.S.C.A. Const.Amends. 5, 14.

[3] Constitutional Law ⇐254.2
92k254.2 Most Cited Cases
[3] Constitutional Law ⇐274(2)
92k274(2) Most Cited Cases
[3] Constitutional Law ⇐274(5)
92k274(5) Most Cited Cases
In addition to the specific freedoms protected by Bill of Rights, "liberty" specially protected by due process clause includes rights to marry, have children, direct education and upbringing of one's children, marital privacy, use contraception, bodily integrity, and abortion. U.S.C.A. Const.Amends. 5, 14.

[4] Constitutional Law ⇐274(2)
92k274(2) Most Cited Cases
Due process clause protects traditional right to refuse unwanted lifesaving medical treatment. U.S.C.A. Const.Amends. 5, 14.

[5] Constitutional Law ⇐252.5
92k252.5 Most Cited Cases
[5] Constitutional Law ⇐254.1
92k254.1 Most Cited Cases
Substantive due process analysis has two primary features of specially protecting those fundamental rights and liberties which are, objectively, deeply

rooted in nation's history and tradition, and providing careful description of asserted fundamental liberty interest. U.S.C.A. Const.Amends. 5, 14.

[6] Constitutional Law ⇐274(2)
92k274(2) Most Cited Cases
Asserted right to assistance in committing suicide is not fundamental liberty interest protected by due process clause; history of law's treatment of assisted suicide has been and continues to be rejection of nearly all efforts to permit it. U.S.C.A. Const.Amends. 5, 14.

[7] Constitutional Law ⇐274(2)
92k274(2) Most Cited Cases
Asserted right to commit suicide, which itself includes right to assistance in doing so, has no place in nation's traditions, for purposes of substantive due process analysis; consistent and almost universal tradition has long rejected asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. U.S.C.A. Const.Amends. 5, 14.

[8] Constitutional Law ⇐274(2)
92k274(2) Most Cited Cases
[8] Suicide ⇐3
368k3 Most Cited Cases
Washington's assisted-suicide ban was rationally related to legitimate government interests in preservation of human life, preventing suicide, maintaining integrity and ethics of medical profession, protecting vulnerable persons who might be pressured into physician-assisted suicide, and protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes and societal indifference; thus, it did not violate due process clause. U.S.C.A. Const.Amend. 14; West's RCWA 9A.36.060(1).

****2259** *Syllabus* [FN*]

> FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

It has always been a crime to assist a suicide in the State of Washington. The State's present law makes "[p]romoting a suicide attempt" a felony, and provides: "A person is guilty of [that crime] when he knowingly causes or aids another person to attempt suicide." Respondents, four Washington physicians who occasionally treat terminally ill, suffering patients, declare that they would assist these patients in ending their lives if not for the State's assisted-suicide ban. They, along with three gravely ill plaintiffs who have since died and a nonprofit organization that counsels people considering physician-assisted suicide, filed this suit against petitioners, the State and its Attorney General, seeking a declaration that the ban is, on its face, unconstitutional. They assert a liberty interest protected by the Fourteenth Amendment's Due Process Clause which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide. Relying primarily on *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, and *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224, the Federal District Court agreed, concluding that Washington's assisted-suicide ban is unconstitutional because it places an undue burden on the exercise of that constitutionally protected liberty interest. The en banc Ninth Circuit affirmed.

Held: Washington's prohibition against "caus[ing]" or "aid[ing]" a suicide does not violate the Due Process Clause. Pp. 2262-2275.

(a) An examination of our Nation's history, legal traditions, and practices demonstrates that Anglo-American common law has punished or otherwise disapproved of assisting suicide for over 700 years; that rendering such assistance is still a crime in almost every State; that such prohibitions have never contained exceptions for those who were near death; that the prohibitions have in recent years been reexamined and, ****2260** for the most part, reaffirmed in a number of States; and that the President recently signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits the use of federal funds in support of physician-assisted suicide. Pp. 2262- 2267.

(b) In light of that history, this Court's decisions lead to the conclusion that respondents' asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due

Process Clause. ***703** The Court's established method of substantive-due-process analysis has two primary features: First, the Court has regularly observed that the Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition. *E.g., Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 1937-1938, 52 L.Ed.2d 531 (plurality opinion). Second, the Court has required a "careful description" of the asserted fundamental liberty interest. *E.g., Reno v. Flores,* 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1. The Ninth Circuit's and respondents' various descriptions of the interest here at stake--*e.g.,* a right to "determin[e] the time and manner of one's death," the "right to die," a "liberty to choose how to die," a right to "control of one's final days," "the right to choose a humane, dignified death," and "the liberty to shape death"-- run counter to that second requirement. Since the Washington statute prohibits "aid[ing] another person to attempt suicide," the question before the Court is more properly characterized as whether the "liberty" specially protected by the Clause includes a right to commit suicide which itself includes a right to assistance in doing so. This asserted right has no place in our Nation's traditions, given the country's consistent, almost universal, and continuing rejection of the right, even for terminally ill, mentally competent adults. To hold for respondents, the Court would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. Respondents' contention that the asserted interest *is* consistent with this Court's substantive-due-process cases, if not with this Nation's history and practice, is unpersuasive. The constitutionally protected right to refuse lifesaving hydration and nutrition that was discussed in *Cruzan, supra,* at 279, 110 S.Ct., at 2851-2852, was not simply deduced from abstract concepts of personal autonomy, but was instead grounded in the Nation's history and traditions, given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment. And although *Casey* recognized that many of the rights and liberties protected by the Due Process Clause sound in personal autonomy, 505 U.S., at 852, 112 S.Ct., at 2807, it does not follow that any and all important, intimate, and personal decisions are so protected, see *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 33-34, 93 S.Ct. 1278, 1296-1297, 36 L.Ed.2d 16. *Casey* did not suggest otherwise. Pp. 2267-2272.

(c) The constitutional requirement that Washington's assisted-suicide ban be rationally related to legitimate government interests, see, *e.g., Heller v. Doe,* 509 U.S. 312, 319-320, 113 S.Ct. 2637, 2642-2643, 125 L.Ed.2d 257, is unquestionably met here. These interests include prohibiting intentional killing and preserving human life; preventing the serious public-health problem of suicide, especially among the young, the elderly, and those suffering from untreated pain or from depression or other mental disorders; protecting ***704** the medical profession's integrity and ethics and maintaining physicians' role as their patients' healers; protecting the poor, the elderly, disabled persons, the terminally ill, and persons in other vulnerable groups from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide toward voluntary and perhaps even involuntary euthanasia. The relative strengths of these various interests need not be weighed exactingly, since they are unquestionably important and legitimate, and the law at issue is at least reasonably related to their promotion and protection. Pp. 2272-2275.

79 F.3d 790 (C.A.9 1996), reversed and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., ****2261** joined. O'CONNOR, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined in part, *post,* p. 2303. STEVENS, J., *post* p. 2304, SOUTER, J., *post,* p. 2275, GINSBURG, J., *post,* p. 2310, and BREYER, J., *post,* p. 2310, filed opinions concurring in the judgment.

William L. Williams, for petitioners.

Walter Dellinger, for the United States as amicus curiae, by special leave of the Court.

Kathryn L. Tucker, Seattle, WA, for respondents.

*705 Chief Justice REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether Washington's prohibition against "caus[ing]" or "aid[ing]" a suicide *706 offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.

It has always been a crime to assist a suicide in the State of Washington. In 1854, Washington's first Territorial Legislature *707 outlawed "assisting another in the commission of self-murder." [FN1] Today, Washington law provides: "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." Wash. Rev.Code § 9A.36.060(1) (1994). "Promoting a suicide attempt" is a felony, punishable by up to five years' imprisonment and up to a $10,000 fine. §§ 9A.36.060(2) and 9A.20.021(1)(c). At the same time, Washington's Natural Death Act, enacted in 1979, states that the "withholding or withdrawal of life-sustaining treatment" at a patient's direction "shall not, for any purpose, constitute a suicide." Wash. Rev.Code § 70.122.070(1). [FN2]

FN1. Act of Apr. 28, 1854, § 17, 1854 Wash. Laws 78 ("Every person deliberately assisting another in the commission of self-murder, shall be deemed guilty of manslaughter"); see also Act of Dec. 2, 1869, § 17, 1869 Wash. Laws 201; Act of Nov. 10, 1873, § 19, 1873 Wash. Laws 184; Criminal Code, ch. 249, §§ 135-136, 1909 Wash. Laws, 11th Sess., 929.

FN2. Under Washington's Natural Death Act, "adult persons have the fundamental right to control the decisions relating to the rendering of their own health care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition." Wash. Rev.Code § 70.122.010 (1994). In Washington, "[a]ny adult person may execute a directive directing the withholding or withdrawal of life-sustaining treatment in a terminal condition or permanent unconscious condition," § 70.122.030, and a physician who, in accordance with such a directive, participates in the withholding or withdrawal of life-sustaining treatment is immune from civil, criminal, or professional liability, § 70.122.051.

Petitioners in this case are the State of Washington and its Attorney General. Respondents Harold Glucksberg, M. D., Abigail Halperin, M. D., Thomas A. Preston, M. D., and Peter Shalit, M. D., are physicians who practice in Washington. These doctors occasionally treat terminally ill, suffering patients, and declare that they would assist these patients in ending their lives if not for Washington's assisted-suicide ban. [FN3] In January 1994, respondents, along with three gravely ill, pseudonymous plaintiffs who have since died and *708 Compassion in Dying, a nonprofit organization that counsels people considering physician-assisted suicide, sued in the United States District Court, seeking a declaration that Wash.Rev.Code § 9A.36.060(1) (1994) is, on its face, unconstitutional. *Compassion in Dying v. Washington,* 850 F.Supp. 1454, 1459 (W.D.Wash.1994). [FN4]

FN3. Glucksberg Declaration, App. 35; Halperin Declaration, *id.,* at 49-50; Preston Declaration, *id.,* at 55-56; Shalit Declaration, *id.,* at 73-74.

FN4. John Doe, Jane Roe, and James Poe, plaintiffs in the District Court, were then in the terminal phases of serious and painful illnesses. They declared that they were mentally competent and desired assistance in ending their lives. Declaration of Jane Roe, *id.,* at 23-25; Declaration of John Doe, *id.,* at 27-28; Declaration of James Poe, *id.,* at 30-31; *Compassion in Dying,* 850 F.Supp., at 1456-1457.

The plaintiffs asserted "the existence of a liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill **2262 adult to commit physician-assisted suicide." *Ibid.* Relying primarily

on *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990), the District Court agreed, 850 F.Supp., at 1459-1462, and concluded that Washington's assisted-suicide ban is unconstitutional because it "places an undue burden on the exercise of [that] constitutionally protected liberty interest." *Id.,* at 1465. [FN5] The District Court also decided that the Washington statute violated the Equal Protection Clause's requirement that " 'all persons similarly situated ... be treated alike.' " *Id.,* at 1466 (quoting *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3253-3254, 87 L.Ed.2d 313 (1985)).

FN5. The District Court determined that *Casey* 's "undue burden" standard, 505 U.S., at 874, 112 S.Ct., at 2818-2819 (joint opinion), not the standard from *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) (requiring a showing that "no set of circumstances exists under which the [law] would be valid"), governed the plaintiffs' facial challenge to the assisted-suicide ban. 850 F.Supp., at 1462-1464.

A panel of the Court of Appeals for the Ninth Circuit reversed, emphasizing that "[i]n the two hundred and five years of our existence no constitutional right to aid in killing ***709** oneself has ever been asserted and upheld by a court of final jurisdiction." *Compassion in Dying v. Washington,* 49 F.3d 586, 591 (1995). The Ninth Circuit reheard the case en banc, reversed the panel's decision, and affirmed the District Court. *Compassion in Dying v. Washington,* 79 F.3d 790, 798 (1996). Like the District Court, the en banc Court of Appeals emphasized our *Casey* and *Cruzan* decisions. 79 F.3d, at 813-816. The court also discussed what it described as "historical" and "current societal attitudes" toward suicide and assisted suicide, *id.,* at 806-812, and concluded that "the Constitution encompasses a due process liberty interest in controlling the time and manner of one's death--that there is, in short, a constitutionally-recognized 'right to die.' " *Id.,* at 816. After "[w]eighing and then balancing" this interest against Washington's various interests, the court held that the State's assisted-suicide ban was unconstitutional "as applied to terminally ill competent adults who wish to hasten their deaths with medication prescribed by their physicians." *Id.,* at 836, 837. [FN6] The court did not reach the District Court's equal protection holding. *Id.,* at 838. [FN7] We granted certiorari, 518 U.S. 1057, 117 S.Ct. 37, 135 L.Ed.2d 1128 (1996), and now reverse.

FN6. Although, as Justice STEVENS observes, 521 U.S., at 739, 117 S.Ct., at 2304 (opinion concurring in judgments), "[the court's] analysis and eventual holding that the statute was unconstitutional was not limited to a particular set of plaintiffs before it," the court did note that "[d]eclaring a statute unconstitutional as applied to members of a group is atypical but not uncommon." 79 F.3d, at 798, n. 9, and emphasized that it was "not deciding the facial validity of [the Washington statute]," *id.,* at 797-798, and nn. 8-9. It is therefore the court's holding that Washington's physician-assisted suicide statute is unconstitutional as applied to the "class of terminally ill, mentally competent patients," 521 U.S., at 750, 117 S.Ct., at 2309 (STEVENS, J., concurring in judgments), that is before us today.

FN7. The Court of Appeals did note, however, that "the equal protection argument relied on by [the District Court] is not insubstantial," 79 F.3d., at 838, n. 139, and sharply criticized the opinion in a separate case then pending before the Ninth Circuit, *Lee v. Oregon,* 891 F.Supp. 1429 (Ore.1995) (Oregon's Death With Dignity Act, which permits physician-assisted suicide, violates the Equal Protection Clause because it does not provide adequate safeguards against abuse), vacated, *Lee v. Oregon,* 107 F.3d 1382 (C.A.9 1997) (concluding that plaintiffs lacked Article III standing). *Lee,* of course, is not before us, any more than it was before the Court of Appeals below, and we offer no opinion as to the validity

of the *Lee* courts' reasoning. In *Vacco v. Quill*, 521 U.S. 793, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997), however, decided today, we hold that New York's assisted-suicide ban does not violate the Equal Protection Clause.

***710** I

We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices. See, *e.g., Casey, supra*, at 849- 850, 112 S.Ct., at 2805-2806; *Cruzan, supra*, at 269-279, 110 S.Ct., at 2846-2842; *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1937- 1938, 52 L.Ed.2d 531 (1977) (plurality opinion) (noting importance of "careful 'respect ****2263** for the teachings of history' "). In almost every State--indeed, in almost every western democracy--it is a crime to assist a suicide. [FN8] The States' assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States' commitment to the protection and preservation of all human life. *Cruzan, supra*, at 280, 110 S.Ct., at 2852 ("[T]he States--indeed, all civilized nations--demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majorityof ***711** States in this country have laws imposing criminal penalties on one who assists another to commit suicide"); see *Stanford v. Kentucky*, 492 U.S. 361, 373, 109 S.Ct. 2969, 2977, 106 L.Ed.2d 306 (1989) ("[T]he primary and most reliable indication of [a national] consensus is ... the pattern of enacted laws"). Indeed, opposition to and condemnation of suicide--and, therefore, of assisting suicide--are consistent and enduring themes of our philosophical, legal, and cultural heritages. See generally Marzen 17-56; New York State Task Force on Life and the Law, When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context 77-82 (May 1994) (hereinafter New York Task Force).

FN8. See *Compassion in Dying v. Washington*, 79 F.3d 790, 847, and nn. 10-13 (C.A.9 1996) (Beezer, J., dissenting) ("In total, forty-four states, the District of Columbia and two territories prohibit or condemn assisted suicide") (citing statutes and cases); *Rodriguez v. British Columbia (Attorney General)*, 107 D.L.R. (4th) 342, 404 (Can.1993) ("[A] blanket prohibition on assisted suicide ... is the norm among western democracies") (discussing assisted-suicide provisions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France). Since the Ninth Circuit's decision, Louisiana, Rhode Island, and Iowa have enacted statutory assisted-suicide bans. La.Rev.Stat. Ann. § 14:32.12 (West Supp.1997); R.I. Gen. Laws §§ 11-60-1, 11-60-3 (Supp.1996); Iowa Code Ann. §§ 707A.2, 707A.3 (Supp.1997). For a detailed history of the States' statutes, see Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquesne L.Rev. 1, 148-242 (1985) (App.) (hereinafter Marzen).

More specifically, for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide. [FN9] *Cruzan*, 497 U.S., at 294-295, 110 S.Ct., at 2859-2860 (SCALIA, J., concurring). In the 13th century, Henry de Bracton, one of the first legal-treatise writers, observed that "[j]ust as a man may commit felony by slaying another so may he do so by slaying himself." 2 Bracton on Laws and Customs of England 423 (f.150) (G. Woodbine ed., S. Thorne transl., 1968). The real and personal property of one who killed himself to avoid conviction and punishment for a crime were forfeit to the King; however, thought Bracton, "if a man slays himself in weariness of life or because he is unwilling to endure further bodily pain ... [only] his movable goods [were] confiscated." *Id.*, at 423-424 (f.150). Thus, "[t]he principle that suicide of a sane person, for whatever reason, was a punishable felony was ... introduced into ***712** English common law." [FN10] Centuries later, Sir William ****2264** Blackstone, whose Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th-century American lawyers, referred to suicide as " self-murder" and "the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to

endure...." 4 W. Blackstone, Commentaries *189. Blackstone emphasized that "the law has ... ranked [suicide] among the highest crimes," *ibid.*, although, anticipating later developments, he conceded that the harsh and shameful punishments imposed for suicide "borde[r] a little upon severity." *Id.*, at *190.

FN9. The common law is thought to have emerged through the expansion of pre-Norman institutions sometime in the 12th century. J. Baker, An Introduction to English Legal History 11 (2d ed.1979). England adopted the ecclesiastical prohibition on suicide five centuries earlier, in the year 673 at the Council of Hereford, and this prohibition was reaffirmed by King Edgar in 967. See G. Williams, The Sanctity of Life and the Criminal Law 257 (1957).

FN10. Marzen 59. Other late-medieval treatise writers followed and restated Bracton; one observed that "man-slaughter" may be "[o]f [one]self; as in case, when people hang themselves or hurt themselves, or otherwise kill themselves of their own felony" or "[o]f others; as by beating, famine, or other punishment; in like cases, all are man-slayers." A. Horne, The Mirrour of Justices, ch. 1, § 9, pp. 41-42 (W. Robinson ed.1903). By the mid-16th century, the Court at Common Bench could observe that "[suicide] is an Offence against Nature, against God, and against the King.... [T]o destroy one's self is contrary to Nature, and a Thing most horrible." *Hales v. Petit*, 1 Plowd. Com. 253, 261, 75 Eng. Rep. 387, 400 (1561-1562).
In 1644, Sir Edward Coke published his Third Institute, a lodestar for later common lawyers. See T. Plucknett, A Concise History of the Common Law 281-284 (5th ed.1956). Coke regarded suicide as a category of murder, and agreed with Bracton that the goods and chattels--but not, for Coke, the lands--of a sane suicide were forfeit. 3 E. Coke, Institutes *54. William Hawkins, in his 1716 Treatise of the Pleas of the Crown, followed Coke, observing that "our laws have always had ... an abhorrence of this crime." 1 W. Hawkins, Pleas of the Crown, ch. 27, § 4, p. 164 (T. Leach ed. 1795).

For the most part, the early American Colonies adopted the common-law approach. For example, the legislators of the Providence Plantations, which would later become Rhode Island, declared, in 1647, that "[s]elf-murder is by all agreed to be the most unnatural, and it is by this present Assembly declared, to be that, wherein he that doth it, kills himself out ***713** of a premeditated hatred against his own life or other humor: ... his goods and chattels are the king's custom, but not his debts nor lands; but in case he be an infant, a lunatic, mad or distracted man, he forfeits nothing." The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719, p. 19 (J. Cushing ed.1977). Virginia also required ignominious burial for suicides, and their estates were forfeit to the Crown. A. Scott, Criminal Law in Colonial Virginia 108, and n. 93, 198, and n. 15 (1930).

Over time, however, the American Colonies abolished these harsh common-law penalties. William Penn abandoned the criminal-forfeiture sanction in Pennsylvania in 1701, and the other Colonies (and later, the other States) eventually followed this example. *Cruzan, supra*, at 294, 110 S.Ct., at 2859-2860 (SCALIA, J., concurring). Zephaniah Swift, who would later become Chief Justice of Connecticut, wrote in 1796:

"There can be no act more contemptible, than to attempt to punish an offender for a crime, by exercising a mean act of revenge upon lifeless clay, that is insensible of the punishment. There can be no greater cruelty, than the inflicting [of] a punishment, as the forfeiture of goods, which must fall solely on the innocent offspring of the offender.... [Suicide] is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society. There can of course be no necessity of any punishment." 2 Z. Swift, A System of the Laws of the State of Connecticut

304 (1796).
This statement makes it clear, however, that the movement away from the common law's harsh sanctions did not represent an acceptance of suicide; rather, as Chief Justice Swift observed, this change reflected the growing consensus that it was unfair to punish the suicide's family for his wrongdoing. *Cruzan, supra,* at 294, 110 S.Ct., at 2859 (SCALIA, J., concurring). Nonetheless, ***714** although States moved away from Blackstone's treatment of suicide, courts continued to condemn it as a grave public wrong. See, *e.g., Bigelow v. Berkshire Life Ins. Co.,* 93 U.S. 284, 286, 23 L.Ed. 918 (1876) (suicide is "an act of criminal self-destruction"); *Von Holden v. Chapman,* 87 A.D.2d 66, 70-71, 450 N.Y.S.2d 623, 626-627 (1982); *Blackwood v. Jones,* 111 Fla. 528, 532, 149 So. 600, 601 (1933) ("No sophistry is tolerated ... which seek[s] to justify self-destruction as commendable or even a matter of personal right").

That suicide remained a grievous, though nonfelonious, wrong is confirmed by the fact that colonial and early state legislatures and courts did not retreat from prohibiting assisting suicide. Swift, in his early 19th-century treatise on the laws of Connecticut, stated that "[i]f one counsels another to commit suicide, and the other by reason of the advice kills himself, the advisor is guilty of murder as principal." 2 Z. Swift, A Digest of the Laws of the State of Connecticut 270 (1823). This was the well-established common-law view, see *In re Joseph G.,* 34 Cal.3d 429, 434-435, 194 Cal.Rptr. 163, 166, 667 P.2d 1176, 1179 (1983); *Commonwealth v. Mink,* 123 Mass. 422, 428 (1877) (" '****2265** Now if the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder' ") (quoting Chief Justice Parker's charge to the jury in *Commonwealth v. Bowen,* 13 Mass. 356 (1816)), as was the similar principle that the consent of a homicide victim is "wholly immaterial to the guilt of the person who cause[d] [his death]," 3 J. Stephen, A History of the Criminal Law of England 16 (1883); see 1 F. Wharton, Criminal Law §§ 451-452 (9th ed. 1885); *Martin v. Commonwealth,* 184 Va. 1009, 1018-1019, 37 S.E.2d 43, 47 (1946) (" 'The right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable' "). And the prohibitions against assisting suicide never contained exceptions for those who were near death. Rather, "[t]he life of those to whom life ha[d] become a burden--of those who [were] hopelessly diseased or fatally wounded--nay, even the lives of criminals ***715** condemned to death, [were] under the protection of the law, equally as the lives of those who [were] in the full tide of life's enjoyment, and anxious to continue to live." *Blackburn v. State,* 23 Ohio St. 146, 163 (1872); see *Bowen, supra,* at 360 (prisoner who persuaded another to commit suicide could be tried for murder, even though victim was scheduled shortly to be executed).

The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828, Act of Dec. 10, 1828, ch. 20, § 4, 1828 N.Y. Laws 19 (codified at 2 N.Y.Rev.Stat. pt. 4, ch. 1, Tit. 2, Art. 1, § 7, p. 661 (1829)), and many of the new States and Territories followed New York's example. Marzen 73-74. Between 1857 and 1865, a New York commission led by Dudley Field drafted a criminal code that prohibited "aiding" a suicide and, specifically, "furnish[ing] another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life." *Id.,* at 76-77. By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide. See *Cruzan,* 497 U.S. at 294-295, 110 S.Ct., at 2859-2860 (SCALIA, J., concurring). The Field Penal Code was adopted in the Dakota Territory in 1877 and in New York in 1881, and its language served as a model for several other western States' statutes in the late 19th and early 20th centuries. Marzen 76-77, 205-206, 212-213. California, for example, codified its assisted-suicide prohibition in 1874, using language similar to the Field Code's. [FN11] In this century, the Model Penal Code also prohibited "aiding" suicide, prompting many States to enact or revise their assisted-suicide ***716** bans. [FN12] The code's drafters observed that "the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another, even though the act may be accomplished with the consent, or at the request, of the suicide victim." American Law Institute, Model Penal Code § 210.5, Comment 5, p. 100 (Official Draft

and Revised Comments 1980).

FN11. In 1850, the California Legislature adopted the English common law, under which assisting suicide was, of course, a crime. Act of Apr. 13, 1850, ch. 95, 1850 Cal. Stats. 219. The provision adopted in 1874 provided that "[e]very person who deliberately aids or advises, or encourages another to commit suicide, is guilty of a felony." Act of Mar. 30, 1874, ch. 614, § 13,400 (codified at Cal.Penal Code § 400 (T. Hittel ed. 1876)).

FN12. "A person who purposely aids or solicits another to commit suicide is guilty of a felony in the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a misdemeanor." American Law Institute, Model Penal Code § 210.5(2) (Official Draft and Revised Comments 1980).

Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 16-18 (1983). Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been ****2266** many significant changes in state laws and in the attitudes these laws reflect. Many States, for example, now permit "living wills," surrogate health-care decisionmaking, and the withdrawal or refusal of life-sustaining medical treatment. See *Vacco v. Quill,* 521 U.S. 793, 804-806, 117 S.Ct. 2293, 2299-2301, 138 L.Ed.2d 834; 79 F.3d, at 818-820; *People v. Kevorkian,* 447 Mich. 436, 478-480, and nn. 53-56, 527 N.W.2d 714, 731-732, and nn. 53-56 (1994). At the same time, however, voters and legislators continue for the most part to reaffirm their States' prohibitions on assisting suicide.

The Washington statute at issue in this case, Wash. Rev.Code § 9A.36.060 (1994), was enacted in 1975 as part of a revision of that State's criminal code. Four years later, ***717** Washington passed its Natural Death Act, which specifically stated that the "withholding or withdrawal of life-sustaining treatment ... shall not, for any purpose, constitute a suicide" and that "[n]othing in this chapter shall be construed to condone, authorize, or approve mercy killing...." Natural Death Act, 1979 Wash. Laws, ch. 112, § 8(1), p. 11 (codified at Wash. Rev.Code § § 70.122.070(1), 70.122.100 (1994)). In 1991, Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician-assisted suicide. [FN13] Washington then added a provision to the Natural Death Act expressly excluding physician-assisted suicide. 1992 Wash. Laws, ch. 98, § 10; Wash. Rev.Code § 70.122.100 (1994).

FN13. Initiative 119 would have amended Washington's Natural Death Act, Wash. Rev.Code § 70.122.010 *et seq.* (1994), to permit "aid-in-dying," defined as "aid in the form of a medical service provided in person by a physician that will end the life of a conscious and mentally competent qualified patient in a dignified, painless and humane manner, when requested voluntarily by the patient through a written directive in accordance with this chapter at the time the medical service is to be provided." App. H to Pet. for Cert. 3-4.

California voters rejected an assisted-suicide initiative similar to Washington's in 1993. On the other hand, in 1994, voters in Oregon enacted, also through ballot initiative, that State's "Death With Dignity Act," which legalized physician-assisted suicide for competent, terminally ill adults. [FN14] Since the Oregon vote, many proposals to legalize assisted-suicide have been and continue to be introduced in the States' legislatures, but none has been enacted. [FN15] And ***718** just last year, Iowa and Rhode Island joined the overwhelming majority of States explicitly prohibiting assisted suicide. See Iowa Code Ann. §§ 707A.2, 707A.3 (Supp.1997); R.I. Gen. Laws §§ 11-60-1, 11-60-3 (Supp.1996). Also, on April 30, 1997, President Clinton signed the Federal Assisted Suicide Funding Restriction Act of 1997, which prohibits

the use of federal funds in support of physician-assisted suicide. Pub.L. 105-12, 111 Stat. 23 (codified at 42 U.S.C. § 14401 *et seq*). [FN16]

FN14. Ore.Rev.Stat. § 127.800 *et seq.* (1996); *Lee v. Oregon,* 891 F.Supp. 1429 (Ore.1995) (Oregon Act does not provide sufficient safeguards for terminally ill persons and therefore violates the Equal Protection Clause), vacated, *Lee v. Oregon,* 107 F.3d 1382 (C.A.9 1997).

FN15. See, *e.g.,* Alaska H.B. 371 (1996); Ariz. S.B. 1007 (1996); Cal. A.B. 1080, A.B. 1310 (1995); Colo. H.B. 1185 (1996); Colo. H.B. 1308 (1995); Conn. H.B. 6298 (1995); Ill. H.B. 691, S.B. 948 (1997); Me. H.P. 663 (1997); Me. H.P. 552 (1995); Md. H.B. 474 (1996); Md. H.B. 933 (1995); Mass. H.B. 3173 (1995); Mich. H.B. 6205, S.B. 556 (1996); Mich. H.B. 4134 (1995); Miss. H.B. 1023 (1996); N.H.H.B. 339 (1995); N.M.S.B. 446 (1995); N.Y.S.B. 5024, A.B. 6333 (1995); Neb. L.B. 406 (1997); Neb. L.B. 1259 (1996); R.I.S. 2985 (1996); Vt. H.B. 109 (1997); Vt. H.B. 335 (1995); Wash. S.B. 5596 (1995); Wis. A.B. 174, S.B. 90 (1995); Senate of Canada, Of Life and Death, Report of the Special Senate Committee on Euthanasia and Assisted Suicide A-56 (June 1995) (describing unsuccessful proposals, between 1991-1994, to legalize assisted suicide).

FN16. Other countries are embroiled in similar debates: The Supreme Court of Canada recently rejected a claim that the Canadian Charter of Rights and Freedoms establishes a fundamental right to assisted suicide, *Rodriguez v. British Columbia (Attorney General),* 107 D.L.R. (4th) 342 (1993); the British House of Lords Select Committee on Medical Ethics refused to recommend any change in Great Britain's assisted-suicide prohibition, House of Lords, Session 1993-94 Report of the Select Committee on Medical Ethics, 12 Issues in Law & Med. 193, 202 (1996) ("We identify no circumstances in which assisted suicide should be permitted"); New Zealand's Parliament rejected a proposed "Death With Dignity Bill" that would have legalized physician-assisted suicide in August 1995, Graeme, MPs Throw out Euthanasia Bill, The Dominion (Wellington), Aug. 17, 1995, p. 1; and the Northern Territory of Australia legalized assisted suicide and voluntary euthanasia in 1995, see Shenon, Australian Doctors Get Right to Assist Suicide, N.Y. Times, July 28, 1995, p. A8. As of February 1997, three persons had ended their lives with physician assistance in the Northern Territory. Mydans, Assisted Suicide: Australia Faces a Grim Reality, N.Y. Times, Feb. 2, 1997, p. A3. On March 24, 1997, however, the Australian Senate voted to overturn the Northern Territory's law. Thornhill, Australia Repeals Euthanasia Law, Washington Post, Mar. 25, 1997, p. A14; see Euthanasia Laws Act 1997, No. 17, 1997 (Austl.). On the other hand, on May 20, 1997, Colombia's Constitutional Court legalized voluntary euthanasia for terminally ill people. Sentencia No. C-239/97 (Corte Constitucional, Mayo 20, 1997); see Colombia's Top Court Legalizes Euthanasia, Orlando Sentinel, May 22, 1997, p. A18.

****2267** ***719** Thus, the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues. For example, New York State's Task Force on Life and the Law--an ongoing, blue-ribbon commission composed of doctors, ethicists, lawyers, religious leaders, and interested laymen--was convened in 1984 and commissioned with "a broad mandate to recommend public policy on issues raised by medical advances." New York Task Force vii. Over the past decade, the Task Force has recommended laws relating to end-of-life decisions, surrogate pregnancy, and organ donation. *Id.,* at 118-119. After studying physician-assisted suicide, however, the Task Force unanimously concluded that "[l]egalizing assisted suicide and euthanasia would pose profound risks to many individuals who

are ill and vulnerable.... [T]he potential dangers of this dramatic change in public policy would outweigh any benefit that might be achieved." *Id.*, at 120.

Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents' constitutional claim.

II

[1][2][3][4] The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Collins v. Harker Heights,* 503 U.S. 115, 125, 112 S.Ct. 1061, 1068-1069, 117 L.Ed.2d 261 (1992) (Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them' ") (quoting ***720** *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores,* 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1446-1447, 123 L.Ed.2d 1 (1993); *Casey,* 505 U.S., at 851, 112 S.Ct., at 2806-2807. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, *ibid.; Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, *Casey, supra.* We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan,* 497 U.S., at 278-279, 110 S.Ct., at 2851-2852.

But we "ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins,* 503 U.S., at 125, 112 S.Ct., at 1068. By extending constitutional protection to an asserted right ****2268** or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," *ibid.,* lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, *Moore,* 431 U.S., at 502, 97 S.Ct., at 1937 (plurality opinion).

[5] Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ***721** "deeply rooted in this Nation's history and tradition," *id.,* at 503, 97 S.Ct., at 1938 (plurality opinion); *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut,* 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. *Flores, supra,* at 302, 113 S.Ct., at 1447; *Collins, supra,* at 125, 112 S.Ct., at 1068; *Cruzan, supra,* at 277-278, 110 S.Ct., at 2850-2851. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins, supra,* at 125, 112 S.Ct., at 1068, that direct and restrain our exposition of the Due Process Clause. As we stated recently in *Flores,* the Fourteenth Amendment "forbids the

government to infringe ... 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U.S., at 302, 113 S.Ct., at 1447.

Justice SOUTER, relying on Justice Harlan's dissenting opinion in *Poe v. Ullman,* would largely abandon this restrained methodology, and instead ask "whether [Washington's] statute sets up one of those 'arbitrary impositions' or 'purposeless restraints' at odds with the Due Process Clause of the Fourteenth Amendment," *post,* at 2275 (quoting *Poe,* 367 U.S. 497, 543, 81 S.Ct. 1752, 1776-1777, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting)). [FN17] ***722** In our view, however, the development of this Court's substantive-due-process jurisprudence, described briefly *supra,* at 2267, has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment--never fully clarified, to be sure, and perhaps not capable of being fully clarified--have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review. In addition, by establishing a threshold requirement--that a challenged state action implicate a fundamental right--before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.

> FN17. In Justice SOUTER's opinion, Justice Harlan's *Poe* dissent supplies the "modern justification" for substantive-due-process review. *Post,* at 2275, and n. 4 (opinion concurring in judgment). But although Justice Harlan's opinion has often been cited in due process cases, we have never abandoned our fundamental-rights-based analytical method. Just four Terms ago, six of the Justices now sitting joined the Court's opinion in *Reno v. Flores,* 507 U.S. 292, 301-305, 113 S.Ct. 1439, 1446-1449, 123 L.Ed.2d 1 (1993); *Poe* was not even cited. And in *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990), neither the Court's nor the concurring opinions relied on *Poe;* rather, we concluded that the right to refuse unwanted medical treatment was so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment. *Cruzan,* 497 U.S., at 278-279, 110 S.Ct., at 2851-2852; *id.,* at 287-288, 110 S.Ct., at 2856-2857 (O'CONNOR, J., concurring). True, the Court relied on Justice Harlan's dissent in *Casey,* 505 U.S., at 848-850, 112 S.Ct., at 2805-2806, but, as *Flores* demonstrates, we did not in so doing jettison our established approach. Indeed, to read such a radical move into the Court's opinion in *Casey* would seem to fly in the face of that opinion's emphasis on *stare decisis.* 505 U.S., at 854-869, 112 S.Ct., at 2808- 2816.

[6] Turning to the claim at issue here, the Court of Appeals stated that "[p]roperly analyzed, the first issue to be resolved is ****2269** whether there is a liberty interest in determining the time and manner of one's death," 79 F.3d, at 801, or, in other words, "[i]s there a right to die?," *id.,* at 799. Similarly, respondents assert a "liberty to choose how to die" and a right to "control of one's final days," Brief for Respondents 7, and describe the asserted liberty as "the right to choose a humane, dignified death," *id.,* at 15, and "the liberty to shape death," *id.,* at 18. As noted above, we have a tradition of carefully formulating the interest at stake in substantive-due-process cases. For example, although *Cruzan* is often described as a "right to die" case, see 79 F.3d, at 799; 521 U.S., at 745, 117 S.Ct., at 2307 (STEVENS, J., concurring in judgments) (*Cruzan* recognized "the more specific interest in making decisions about ***723** how to confront an imminent death"), we were, in fact, more precise: We assumed that the Constitution granted competent persons a "constitutionally protected right to refuse lifesaving hydration and nutrition." *Cruzan,* 497 U.S., at 279, 110 S.Ct., at 2843; *id.,* at 287, 110 S.Ct., at 2856 (O'CONNOR, J., concurring) ("[A] liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions"). The Washington statute at

issue in this case prohibits "aid[ing] another person to attempt suicide," Wash. Rev.Code § 9A.36.060(1) (1994), and, thus, the question before us is whether the "liberty" specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so. [FN18]

> FN18. See, *e.g., Quill v. Vacco,* 80 F.3d 716, 724 (C.A.2 1996) ("right to assisted suicide finds no cognizable basis in the Constitution's language or design"); *Compassion in Dying v. Washington,* 49 F.3d 586, 591 (C.A.9 1995) (referring to alleged "right to suicide," "right to assistance in suicide," and "right to aid in killing oneself"); *People v. Kevorkian,* 447 Mich. 436, 476, n. 47, 527 N.W.2d 714, 730, n. 47 (1994) ("[T]he question that we must decide is whether the [C]onstitution encompasses a right to commit suicide and, if so, whether it includes a right to assistance").

[7] We now inquire whether this asserted right has any place in our Nation's traditions. Here, as discussed *supra,* at 2262-2267, we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. See *Jackman v. Rosenbaum Co.,* 260 U.S. 22, 31, 43 S.Ct. 9, 9-10, 67 L.Ed. 107 (1922) ("If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it"); *Flores,* 507 U.S., at 303, 113 S.Ct., at 1447 ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it").

Respondents contend, however, that the liberty interest they assert *is* consistent with this Court's substantive-due-***724** process line of cases, if not with this Nation's history and practice. Pointing to *Casey* and *Cruzan,* respondents read our jurisprudence in this area as reflecting a general tradition of "self-sovereignty," Brief for Respondents 12, and as teaching that the "liberty" protected by the Due Process Clause includes "basic and intimate exercises of personal autonomy," *id.,* at 10; see *Casey,* 505 U.S., at 847, 112 S.Ct., at 2804-2805 ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter"). According to respondents, our liberty jurisprudence, and the broad, individualistic principles it reflects, protects the "liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference." Brief for Respondents 10. The question presented in this case, however, is whether the protections of the Due Process Clause include a right to commit suicide with another's assistance. With this "careful description" of respondents' claim in mind, we turn to *Casey* and *Cruzan.*

In *Cruzan,* we considered whether Nancy Beth Cruzan, who had been severely injured in an automobile accident and was in a persistive vegetative state, "ha[d] a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment" at her parents' request. ****2270** 497 U.S., at 269, 110 S.Ct., at 2846-2847. We began with the observation that "[a]t common law, even the touching of one person by another without consent and without legal justification was a battery." *Ibid.* We then discussed the related rule that "informed consent is generally required for medical treatment." *Ibid.* After reviewing a long line of relevant state cases, we concluded that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." *Id.,* at 277, 110 S.Ct., at 2851. Next, we reviewed our own cases on the subject, and stated that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior ***725** decisions." *Id.,* at 278, 110 S.Ct., at 2851. Therefore, "for purposes of [that] case, we assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.,* at 279, 110 S.Ct., at 2852; see *id.,* at 287, 110 S.Ct., at 2856 (O'CONNOR, J., concurring). We concluded that, notwithstanding

this right, the Constitution permitted Missouri to require clear and convincing evidence of an incompetent patient's wishes concerning the withdrawal of life-sustaining treatment. *Id.,* at 280-281, 110 S.Ct., at 2852-2853.

Respondents contend that in *Cruzan* we "acknowledged that competent, dying persons have the right to direct the removal of life-sustaining medical treatment and thus hasten death," Brief for Respondents 23, and that "the constitutional principle behind recognizing the patient's liberty to direct the withdrawal of artificial life support applies at least as strongly to the choice to hasten impending death by consuming lethal medication," *id.,* at 26. Similarly, the Court of Appeals concluded that "*Cruzan,* by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognize[d] a liberty interest in hastening one's own death." 79 F.3d, at 816.

The right assumed in *Cruzan,* however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct. See *Vacco v. Quill,* 521 U.S., at 800-808, 117 S.Ct., at 2298-2302. In *Cruzan* itself, we recognized that most States outlawed assisted suicide--and even more do today--and we certainly gave no intimation that the right to refuse unwanted medical treatment could be some-***726** how transmuted into a right to assistance in committing suicide. 497 U.S., at 280, 110 S.Ct., at 2852.

Respondents also rely on *Casey.* There, the Court's opinion concluded that "the essential holding of *Roe v. Wade*[, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973),] should be retained and once again reaffirmed." 505 U.S., at 846, 112 S.Ct., at 2804. We held, first, that a woman has a right, before her fetus is viable, to an abortion "without undue interference from the State"; second, that States may restrict post viability abortions, so long as exceptions are made to protect a woman's life and health; and third, that the State has legitimate interests throughout a pregnancy in protecting the health of the woman and the life of the unborn child. *Ibid.* In reaching this conclusion, the opinion discussed in some detail this Court's substantive-due-process tradition of interpreting the Due Process Clause to protect certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and noted that many of those rights and liberties "involv[e] the most intimate and personal choices a person may make in a lifetime." *Id.,* at 851, 112 S.Ct., at 2807.

The Court of Appeals, like the District Court, found *Casey* " 'highly instructive' " and " 'almost prescriptive' " for determining " 'what liberty interest may inhere in a terminally ****2271** ill person's choice to commit suicide' ":

> "Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.' " 79 F.3d, at 813-814.

Similarly, respondents emphasize the statement in *Casey* that:

> "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they ***727** formed under compulsion of the State." *Casey,* 505 U.S., at 851, 112 S.Ct., at 2807.

Brief for Respondents 12. By choosing this language, the Court's opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment. [FN19] The opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observation that "though the abortion decision may

originate within the zone of conscience and belief, it is *more than a philosophic exercise.*" *Casey,* 505 U.S., at 852, 112 S.Ct., at 2807 (emphasis added). That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, **728San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 33-35, 93 S.Ct. 1278, 1296-1298, 36 L.Ed.2d 16 (1973), and *Casey* did not suggest otherwise.

> FN19. See *Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 1937-1938, 52 L.Ed.2d 531 (1977) ("[T]he Constitution protects the sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition" (emphasis added)); *Griswold v. Connecticut,* 381 U.S. 479, 485-486, 85 S.Ct. 1678, 1682- 1683, 14 L.Ed.2d 510 (1965) (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the Bill of Rights"); *id.,* at 495-496, 85 S.Ct., at 1687-1688 (Goldberg, J., concurring) (the law in question "disrupt[ed] the traditional relation of the family--a relation as old and as fundamental as our entire civilization"); *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 1823-1824, 18 L.Ed.2d 1010 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness"); *Turner v. Safley,* 482 U.S. 78, 95, 107 S.Ct. 2254, 2265, 96 L.Ed.2d 64 (1987) ("[T]he decision to marry is a fundamental right"); *Roe v. Wade,* 410 U.S. 113, 140, 93 S.Ct. 705, 720-721, 35 L.Ed.2d 147 (1973) (stating that at the founding and throughout the 19th century, "a woman enjoyed a substantially broader right to terminate a pregnancy"); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942) ("Marriage and procreation are fundamental"); *Pierce v. Society of Sisters,* 268 U.S. 510, 535, 45 S.Ct. 571, 573-574, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626- 627, 67 L.Ed. 1042 (1923) (liberty includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

[8] The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests. See *Heller v. Doe,* 509 U.S. 312, 319- 320, 113 S.Ct. 2637, 2642-2643, 125 L.Ed.2d 257 (1993); *Flores,* 507 U.S., at 305, 113 S.Ct., at 1448-1449. This requirement is unquestionably met here. As the court below recognized, 79 F.3d, at 816-817, [FN20] Washington's assisted-suicide ban implicates a number ****2272** of state interests. [FN21] See 49 F.3d, at 592-593; Brief for State of California et al. as *Amici Curiae* 26-29; Brief for United States as *Amicus Curiae* 16-27.

> FN20. The court identified and discussed six state interests: (1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses. 79 F.3d, at 816-832.

> FN21. Respondents also admit the existence of these interests, Brief for Respondents 28-39, but contend that Washington could better promote and protect them through regulation, rather than prohibition, of physician-assisted suicide. Our inquiry, however, is limited to the question whether the State's prohibition is rationally related to legitimate state interests.

First, Washington has an "unqualified interest in

the preservation of human life." *Cruzan*, 497 U.S., at 282, 110 S.Ct., at 2853. The State's prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. See *id.*, at 280, 110 S.Ct., at 2852; Model Penal Code § 210.5, Comment 5, at 100 ("[T]he interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of ***729** another"). [FN22] This interest is symbolic and aspirational as well as practical:

> FN22. The States express this commitment by other means as well: "[N]early all states expressly disapprove of suicide and assisted suicide either in statutes dealing with durable powers of attorney in health-care situations, or in 'living will' statutes. In addition, all states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts." *People v. Kevorkian*, 447 Mich., at 478-479, and nn. 53-56, 527 N.W.2d, at 731-732, and nn. 53-56.

> "While suicide is no longer prohibited or penalized, the ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions." New York Task Force 131-132.

Respondents admit that "[t]he State has a real interest in preserving the lives of those who can still contribute to society and have the potential to enjoy life." Brief for Respondents 35, n. 23. The Court of Appeals also recognized Washington's interest in protecting life, but held that the "weight" of this interest depends on the "medical condition and the wishes of the person whose life is at stake." 79 F.3d, at 817. Washington, however, has rejected this sliding-scale approach and, through its assisted-suicide ban, insists that all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law. See *United States v. Rutherford*, 442 U.S. 544, 558, 99 S.Ct. 2470, 2478-2479, 61 L.Ed.2d 68 (1979) ("... Congress could reasonably have determined to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise"). As we have previously affirmed, the States "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy," ***730** *Cruzan, supra*, at 282, 110 S.Ct., at 2853. This remains true, as *Cruzan* makes clear, even for those who are near death.

Relatedly, all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups. See Washington State Dept. of Health, Annual Summary of Vital Statistics 1991, pp. 29-30 (Oct.1992) (suicide is a leading cause of death in Washington of those between the ages of 14 and 54); New York Task Force 10, 23-33 (suicide rate in the general population is about one percent, and suicide is especially prevalent among the young and the elderly). The State has an interest in preventing suicide, and in studying, identifying, and treating its causes. See 79 F.3d, at 820; *id.*, at 854 (Beezer, J., dissenting) ("The state recognizes suicide as a manifestation of medical and psychological anguish"); Marzen 107- 146.

Those who attempt suicide--terminally ill or not--often suffer from depression or other mental disorders. See New York Task Force 13-22, 126-128 (more than 95% of those who commit suicide had a major psychiatric illness at the time of death; among the terminally ill, uncontrolled pain is a "risk factor" because it contributes to depression); Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman ****2273** Charles T. Canady to the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 10-11 (Comm. Print 1996); cf. Back, Wallace, Starks, & Pearlman, Physician-Assisted Suicide and Euthanasia in Washington State, 275 JAMA 919, 924 (1996) ("[I]ntolerable physical symptoms are not the reason most patients request physician-assisted suicide or euthanasia"). Research indicates, however, that many people who request physician-assisted suicide withdraw that

request if their depression and pain are treated. H. Hendin, Seduced by Death: Doctors, Patients and the Dutch Cure 24-25 (1997) (suicidal, terminally ill patients "usually respond well to treatment for depressive illness and pain medication and are then grateful to be alive"); New York Task Force 177-178. ***731** The New York Task Force, however, expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients' needs. *Id.,* at 175. Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.

The State also has an interest in protecting the integrity and ethics of the medical profession. In contrast to the Court of Appeals' conclusion that "the integrity of the medical profession would [not] be threatened in any way by [physician-assisted suicide]," 79 F.3d, at 827, the American Medical Association, like many other medical and physicians' groups, has concluded that "[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer." American Medical Association, Code of Ethics § 2.211 (1994); see Council on Ethical and Judicial Affairs, Decisions Near the End of Life, 267 JAMA 2229, 2233 (1992) ("[T]he societal risks of involving physicians in medical interventions to cause patients' deaths is too great"); New York Task Force 103-109 (discussing physicians' views). And physician-assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming. Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 2d Sess., 355-356 (1996) (testimony of Dr. Leon R. Kass) ("The patient's trust in the doctor's whole-hearted devotion to his best interests will be hard to sustain").

Next, the State has an interest in protecting vulnerable groups-- including the poor, the elderly, and disabled persons--from abuse, neglect, and mistakes. The Court of Appeals dismissed the State's concern that disadvantaged persons might be pressured into physician-assisted suicide as ***732** "ludicrous on its face." 79 F.3d, at 825. We have recognized, however, the real risk of subtle coercion and undue influence in end-of-life situations. *Cruzan,* 497 U.S., at 281, 110 S.Ct., at 2852. Similarly, the New York Task Force warned that "[l]egalizing physician-assisted suicide would pose profound risks to many individuals who are ill and vulnerable.... The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group." New York Task Force 120; see *Compassion in Dying,* 49 F.3d, at 593 ("An insidious bias against the handicapped--again coupled with a cost-saving mentality--makes them especially in need of Washington's statutory protection"). If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs.

The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal indifference." 49 F.3d, at 592. The State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's. See New York Task Force 101-102; Physician-Assisted Suicide and Euthanasia ****2274** in the Netherlands: A Report of Chairman Charles T. Canady, *supra,* at 9, 20 (discussing prejudice toward the disabled and the negative messages euthanasia and assisted suicide send to handicapped patients).

Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia. The Court of Appeals struck down ***733** Washington's assisted-suicide ban only "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their

doctors." 79 F.3d, at 838. Washington insists, however, that the impact of the court's decision will not and cannot be so limited. Brief for Petitioners 44-47. If suicide is protected as a matter of constitutional right, it is argued, "every man and woman in the United States must enjoy it." *Compassion in Dying,* 49 F.3d, at 591; see *Kevorkian,* 447 Mich., at 470, n. 41, 527 N.W.2d, at 727-728, n. 41. The Court of Appeals' decision, and its expansive reasoning, provide ample support for the State's concerns. The court noted, for example, that the "decision of a duly appointed surrogate decision maker is for all legal purposes the decision of the patient himself," 79 F.3d, at 832, n. 120; that "in some instances, the patient may be unable to self-administer the drugs and ... administration by the physician ... may be the only way the patient may be able to receive them," *id.,* at 831; and that not only physicians, but also family members and loved ones, will inevitably participate in assisting suicide, *id.,* at 838, n. 140. Thus, it turns out that what is couched as a limited right to "physician-assisted suicide" is likely, in effect, a much broader license, which could prove extremely difficult to police and contain. [FN23] Washington's ban on assisting suicide prevents such erosion.

> FN23. Justice SOUTER concludes that "[t]he case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not." *Post,* at 2291 (opinion concurring in judgment). We agree that the case for a slippery slope has been made out, but--bearing in mind Justice Cardozo's observation of "[t]he tendency of a principle to expand itself to the limit of its logic," The Nature of the Judicial Process 51 (1932)--we also recognize the reasonableness of the widely expressed skepticism about the lack of a principled basis for confining the right. See Brief for United States as *Amicus Curiae* 26 ("Once a legislature abandons a categorical prohibition against physician assisted suicide, there is no obvious stopping point"); Brief for Not Dead Yet et al. as *Amici Curiae* 21-29; Brief for Bioethics Professors as *Amici Curiae* 23-26; Report of the Council on Ethical and Judicial Affairs, App. 133, 140 ("[I]f assisted suicide is permitted, then there is a strong argument for allowing euthanasia"); New York Task Force 132; Kamisar, The " Right to Die": On Drawing (and Erasing) Lines, 35 Duquesne L.Rev. 481 (1996); Kamisar, Against Assisted Suicide--Even in a Very Limited Form, 72 U. Det. Mercy L.Rev. 735 (1995).

***734** This concern is further supported by evidence about the practice of euthanasia in the Netherlands. The Dutch government's own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia (defined as "the deliberate termination of another's life at his request"), 400 cases of assisted suicide, and more than 1,000 cases of euthanasia without an explicit request. In addition to these latter 1,000 cases, the study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patients' explicit consent. Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady, *supra,* at 12-13 (citing Dutch study). This study suggests that, despite the existence of various reporting procedures, euthanasia in the Netherlands has not been limited to competent, terminally ill adults who are enduring physical suffering, and that regulation of the practice may not have prevented abuses in cases involving vulnerable persons, including severely disabled neonates and elderly persons suffering from dementia. *Id.,* at 16-21; see generally C. Gomez, Regulating Death: Euthanasia and the Case of the Netherlands (1991); H. Hendin, Seduced By Death: Doctors, Patients, and the Dutch Cure (1997). The New York Task Force, citing the Dutch experience, observed that "assisted suicide and euthanasia are closely linked," New York Task Force 145, and concluded that the "risk ****2275** of ... abuse is neither speculative nor distant," *id.,* at 134. Washington, like most ***735**

other States, reasonably ensures against this risk by banning, rather than regulating, assisting suicide. See *United States v. 12 200-ft. Reels of Super 8MM. Film,* 413 U.S. 123, 127, 93 S.Ct. 2665, 2668, 37 L.Ed.2d 500 (1973) ("Each step, when taken, appear[s] a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance").

We need not weigh exactingly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that Wash. Rev.Code § 9A.36.060(1) (1994) does not violate the Fourteenth Amendment, either on its face or "as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors." 79 F.3d, at 838. [FN24]

FN24. Justice STEVENS states that "the Court does conceive of respondents' claim as a facial challenge--addressing not the application of the statute to a particular set of plaintiffs before it, but the constitutionality of the statute's categorical prohibition...." 521 U.S., at 740, 117 S.Ct., at 2305 (opinion concurring in judgments). We emphasize that we today reject the Court of Appeals' specific holding that the statute is unconstitutional "as applied" to a particular class. See n. 6, *supra.* Justice STEVENS agrees with this holding, see 521 U.S., at 750, 117 S.Ct., at 2309, but would not "foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge," *ibid.* Our opinion does not absolutely foreclose such a claim. However, given our holding that the Due Process Clause of the Fourteenth Amendment does not provide heightened protection to the asserted liberty interest in ending one's life with a physician's assistance, such a claim would have to be quite different from the ones advanced by respondents here.

* * *

Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society. The decision of the en banc Court of Appeals is ***736** reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

***752** Justice SOUTER, concurring in the judgment.

Three terminally ill individuals and four physicians who sometimes treat terminally ill patients brought this challenge to the Washington statute making it a crime "knowingly ... [to] ai[d] another person to attempt suicide," Wash. Rev.Code § 9A.36.060 (1994), claiming on behalf of both patients and physicians that it would violate substantive due process to enforce the statute against a doctor who acceded to a dying patient's request for a drug to be taken by the patient to commit suicide. The question is whether the statute sets up one of those "arbitrary impositions" or "purposeless restraints" at odds with the Due Process Clause of the Fourteenth Amendment. *Poe v. Ullman,* 367 U.S. 497, 543, 81 S.Ct. 1752, 1776-1777, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). I conclude that the statute's application to the doctors has not been shown to be unconstitutional, but I write separately to give my reasons for analyzing the substantive due process claims as I do, and for rejecting this one.

I

Although the terminally ill original parties have died during the pendency of this case, the four physicians who remain ***753** as respondents here [FN1] continue to request declaratory and injunctive relief for their own benefit in discharging their obligations to other dying patients who request their help. [FN2] See, *e.g., Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911) (question was capable of repetition yet ****2276** evading review). The case reaches us on an order granting summary

judgment, and we must take as true the undisputed allegations that each of the patients was mentally competent and terminally ill, and that each made a knowing and voluntary choice to ask a doctor to prescribe "medications ... to be self-administered for the purpose of hastening ... death." Complaint ¶ 2.3. The State does not dispute that each faced a passage to death more agonizing both mentally and physically, and more protracted over time, than death by suicide with a physician's help, or that each would have chosen such a suicide for the sake of personal dignity, apart even from relief from pain. Each doctor in this case claims to encounter patients like the original plaintiffs who have died, that is, mentally competent, terminally ill, and seeking medical help in "the voluntary self-termination of life." *Id.*, ¶¶ 2.5-2.8. While there may be no unanimity on the physician's professional obligation in such circumstances, I accept here respondents' representation that providing such patients with prescriptions for drugs that go beyond pain relief to hasten death would, in these circumstances, be consistent with standards of medical practice. Hence, I take it to be true, as respondents say, that the Washington statute prevents the exercise of a physician's "best professional judgment to prescribe medications to [such] patients in dosages that would enable them to act to hasten their own deaths." *Id.*, ¶ 2.6; see also App. 35-37, 49-51, 55-57, 73-75.

> FN1. A nonprofit corporation known as Compassion in Dying was also a plaintiff and appellee below but is not a party in this Court.
>
> FN2. As I will indicate in some detail below, I see the challenge to the statute not as facial but as-applied, and I understand it to be in narrower terms than those accepted by the Court.

***754** In their brief to this Court, the doctors claim not that they ought to have a right generally to hasten patients' imminent deaths, but only to help patients who have made "personal decisions regarding their own bodies, medical care, and, fundamentally, the future course of their lives," Brief for Respondents 12, and who have concluded responsibly and with substantial justification that the brief and anguished remainders of their lives have lost virtually all value to them. Respondents fully embrace the notion that the State must be free to impose reasonable regulations on such physician assistance to ensure that the patients they assist are indeed among the competent and terminally ill and that each has made a free and informed choice in seeking to obtain and use a fatal drug. Complaint ¶ 3.2; App. 28-41.

In response, the State argues that the interest asserted by the doctors is beyond constitutional recognition because it has no deep roots in our history and traditions. Brief for Petitioners 21-25. But even aside from that, without disputing that the patients here were competent and terminally ill, the State insists that recognizing the legitimacy of doctors' assistance of their patients as contemplated here would entail a number of adverse consequences that the Washington Legislature was entitled to forestall. The nub of this part of the State's argument is not that such patients are constitutionally undeserving of relief on their own account, but that any attempt to confine a right of physician assistance to the circumstances presented by these doctors is likely to fail. *Id.*, at 34-35, 44-47.

First, the State argues that the right could not be confined to the terminally ill. Even assuming a fixed definition of that term, the State observes that it is not always possible to say with certainty how long a person may live. *Id.*, at 34. It asserts that "[t]here is no principled basis on which [the right] can be limited to the prescription of medication for terminally ill patients to administer to themselves" when the right's justifying principle is as broad as " 'merciful termination ***755** of suffering.' " *Id.*, at 45 (citing Y. Kamisar, Are Laws Against Assisted Suicide Unconstitutional?, Hastings Center Report 32, 36-37 (May-June 1993)). Second, the State argues that the right could not be confined to the mentally competent, observing that a person's competence cannot always be assessed with certainty, Brief for Petitioners 34, and suggesting further that no principled distinction is possible between a competent patient acting independently and a patient acting through a duly appointed and competent surrogate, *id.*, at 46. Next, according to the State, such a right might entail a right to or at least merge in practice into "other forms of

life-ending assistance," such as euthanasia. *Id.*, at 46-47. Finally, the State believes that a right to physician assistance could not easily be distinguished from a right to assistance **2277 from others, such as friends, family, and other health-care workers. *Id.*, at 47. The State thus argues that recognition of the substantive due process right at issue here would jeopardize the lives of others outside the class defined by the doctors' claim, creating risks of irresponsible suicides and euthanasia, whose dangers are concededly within the State's authority to address.

II

When the physicians claim that the Washington law deprives them of a right falling within the scope of liberty that the Fourteenth Amendment guarantees against denial without due process of law, [FN3] they are not claiming some sort of procedural defect in the process through which the statute has been enacted or is administered. Their claim, rather, is that the State has no substantively adequate justification for barring the assistance sought by the patient and sought to be offered by the physician. Thus, we are dealing with a claim to one of those rights sometimes described as rights *756 of substantive due process and sometimes as unenumerated rights, in view of the breadth and indeterminacy of the "due process" serving as the claim's textual basis. The doctors accordingly arouse the skepticism of those who find the Due Process Clause an unduly vague or oxymoronic warrant for judicial review of substantive state law, just as they also invoke two centuries of American constitutional practice in recognizing unenumerated, substantive limits on governmental action. Although this practice has neither rested on any single textual basis nor expressed a consistent theory (or, before *Poe v. Ullman*, a much articulated one), a brief overview of its history is instructive on two counts. The persistence of substantive due process in our cases points to the legitimacy of the modern justification for such judicial review found in Justice Harlan's dissent in *Poe*, [FN4] on which I will dwell further on, while the acknowledged failures of some of these cases point with caution to the difficulty raised by the present claim.

FN3. The doctors also rely on the Equal Protection Clause, but that source of law does essentially nothing in a case like this that the Due Process Clause cannot do on its own.

FN4. The status of the Harlan dissent in *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961), is shown by the Court's adoption of its result in *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and by the Court's acknowledgment of its status and adoption of its reasoning in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 848-849, 112 S.Ct. 2791, 2805-2806, 120 L.Ed.2d 674 (1992). See also *Youngberg v. Romeo*, 457 U.S. 307, 320, 102 S.Ct. 2452, 2460, 73 L.Ed.2d 28 (1982) (citing Justice Harlan's *Poe* dissent as authority for the requirement that this Court balance "the liberty of the individual" and "the demands of an organized society"); *Roberts v. United States Jaycees*, 468 U.S. 609, 619, 104 S.Ct. 3244, 3250, 82 L.Ed.2d 462 (1984); *Moore v. East Cleveland*, 431 U.S. 494, 500-506, and n. 12, 97 S.Ct. 1932, 1936-1939 and n. 12, 52 L.Ed.2d 531 (1977) (plurality opinion) (opinion for four Justices treat ing Justice Harlan's *Poe* dissent as a central explication of the methodology of judicial review under the Due Process Clause).

Before the ratification of the Fourteenth Amendment, substantive constitutional review resting on a theory of unenumerated rights occurred largely in the state courts applying state constitutions that commonly contained either due process clauses like that of the Fifth Amendment (and later the Fourteenth) or the textual antecedents of such clauses, repeating *757 Magna Carta's guarantee of "the law of the land." [FN5] On the basis of such clauses, or of general principles untethered to specific constitutional language, state courts evaluated the constitutionality of a wide range of statutes.

FN5. Coke indicates that prohibitions against deprivations without "due process

> of law" originated in an English statute that "rendred" Magna Carta's "law of the land" in such terms. See 2 E. Coke, Institutes 50 (1797); see also E. Corwin, Liberty Against Government 90-91 (1948).

Thus, a Connecticut court approved a statute legitimating a class of previous illegitimate marriages, as falling within the terms of the "social compact," while making clear its power to review constitutionality in those terms. *Goshen v. Stonington,* 4 Conn. 209, 225-226 (1822). In the same period, a specialized court of equity, created under a Tennessee statute solely to hear cases brought by the state bank against its debtors, found its own authorization unconstitutional as "partial" legislation violating the State Constitution's "****2278** law of the land" clause. *Bank of the State v. Cooper,* 10 Tenn. 599, 2 Yerg. 599, 602-608 (1831) (opinion of Green, J.); *id.,* 2 Yer., at 613-615 (opinion of Peck, J.); *id.,* at 618-623 (opinion of Kennedy, J.). And the middle of the 19th century brought the famous *Wynehamer* case, invalidating a statute purporting to render possession of liquor immediately illegal except when kept for narrow, specified purposes, the state court finding the statute inconsistent with the State's due process clause. *Wynehamer v. People,* 13 N.Y. 378, 486-487 (1856). The statute was deemed an excessive threat to the "fundamental rights of the citizen" to property. *Id.,* at 398 (opinion of Comstock, J.). See generally E. Corwin, Liberty Against Government 58-115 (1948) (discussing substantive due process in the state courts before the Civil War); T. Cooley, Constitutional Limitations *85-*129, *351-*397.

Even in this early period, however, this Court anticipated the developments that would presage both the Civil War and the ratification of the Fourteenth Amendment, by making it clear on several occasions that it too had no doubt of the ***758** judiciary's power to strike down legislation that conflicted with important but unenumerated principles of American government. In most such instances, after declaring its power to invalidate what it might find inconsistent with rights of liberty and property, the Court nevertheless went on to uphold the legislative Acts under review. See, *e.g., Wilkinson v. Leland,* 2 Pet. 627, 656-661, 7 L.Ed. 542 (1829); *Calder v. Bull,* 3 Dall. 386, 386-395, 1 L.Ed. 648 (1798) (opinion of Chase, J.); see also *Corfield v. Coryell,* 6 F. Cas. 546, 550-552, No. 3,230 (CC ED Pa.1823). But in *Fletcher v. Peck,* 6 Cranch 87, 3 L.Ed. 162 (1810), the Court went further. It struck down an Act of the Georgia Legislature that purported to rescind a sale of public land *ab initio* and reclaim title for the State, and so deprive subsequent, good-faith purchasers of property conveyed by the original grantees. The Court rested the invalidation on alternative sources of authority: the specific prohibitions against bills of attainder, *ex post facto* laws, laws impairing contracts in Article I, § 10, of the Constitution; and "general principles which are common to our free institutions," by which Chief Justice Marshall meant that a simple deprivation of property by the State could not be an authentically "legislative" Act. *Fletcher, supra,* at 135- 139, 3 L.Ed. 162.

Fletcher was not, though, the most telling early example of such review. For its most salient instance in this Court before the adoption of the Fourteenth Amendment was, of course, the case that the Amendment would in due course overturn, *Dred Scott v. Sandford,* 19 How. 393, 15 L.Ed. 691 (1857). Unlike *Fletcher; Dred Scott* was textually based on a Due Process Clause (in the Fifth Amendment, applicable to the National Government), and it was in reliance on that Clause's protection of property that the Court invalidated the Missouri Compromise. 19 How., at 449-452. This substantive protection of an owner's property in a slave taken to the territories was traced to the absence of any enumerated power to affect that property granted to the Congress by Article I of the Constitution, *id.,* at 451-452, the implication ***759** being that the Government had no legitimate interest that could support the earlier congressional compromise. The ensuing judgment of history needs no recounting here.

After the ratification of the Fourteenth Amendment, with its guarantee of due process protection against the States, interpretation of the words "liberty" and "property" as used in Due Process Clauses became a sustained enterprise, with the Court generally describing the due process criterion in converse terms of reasonableness or arbitrariness. That standard is fairly traceable to

Justice Bradley's dissent in the *Slaughter-House Cases,* 16 Wall. 36, 21 L.Ed. 394 (1873), in which he said that a person's right to choose a calling was an element of liberty (as the calling, once chosen, was an aspect of property) and declared that the liberty and property protected by due process are not truly recognized if such rights may be "arbitrarily assailed," *id.,* 16 Wall., at 116. [FN6] After ****2279** that, opinions comparable to those that preceded *Dred Scott* expressed willingness to review legislative action for consistency with the Due Process Clause even as they upheld the laws in question. See, *e.g., Bartemeyer v. Iowa,* 18 Wall. 129, 133-135, 21 L.Ed. 929 (1874); *Munn v. Illinois,* 94 U.S. 113, 123-135, 24 L.Ed. 77 (1877); *Railroad Comm'n Cases,* 116 U.S. 307, 331, 6 S.Ct. 1191, 29 L.Ed. 636 (1886); ***760***Mugler v. Kansas,* 123 U.S. 623, 659-670, 8 S.Ct. 273, 295- 302, 31 L.Ed. 205 (1887). See generally Corwin, *supra,* at 121-136 (surveying the Court's early Fourteenth Amendment cases and finding little dissent from the general principle that the Due Process Clause authorized judicial review of substantive statutes).

> FN6. The *Slaughter-House Cases* are important, of course, for their holding that the Privileges and Immunities Clause was no source of any but a specific handful of substantive rights. 16 Wall., at 74-80. To a degree, then, that decision may have led the Court to look to the Due Process Clause as a source of substantive rights. In *Twining v. New Jersey,* 211 U.S. 78, 95-97, 29 S.Ct. 14, 17-19, 53 L.Ed. 97 (1908), for example, the Court of the *Lochner* Era acknowledged the strength of the case against *Slaughter-House* 's interpretation of the Privileges or Immunities Clause but reaffirmed that interpretation without questioning its own frequent reliance on the Due Process Clause as authorization for substantive judicial review. See also J. Ely, Democracy and Distrust 14- 30 (1980) (arguing that the Privileges and Immunities Clause and not the Due Process Clause is the proper warrant for courts' substantive oversight of state legislation). But the courts' use of Due Process Clauses for that purpose antedated the 1873 decision, as we have seen, and would in time be supported in the *Poe* dissent, as we shall see.

The theory became serious, however, beginning with *Allgeyer v. Louisiana,* 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897), where the Court invalidated a Louisiana statute for excessive interference with Fourteenth Amendment liberty to contract, *id.,* at 588-593, 17 S.Ct., at 430-433, and offered a substantive interpretation of "liberty," that in the aftermath of the so-called *Lochner* Era has been scaled back in some respects, but expanded in others, and never repudiated in principle. The Court said that Fourteenth Amendment liberty includes "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Id.,* at 589, 17 S.Ct., at 431. "[W]e do not intend to hold that in no such case can the State exercise its police power," the Court added, but "[w]hen and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises." *Id.,* at 590, 17 S.Ct., at 432.

Although this principle was unobjectionable, what followed for a season was, in the realm of economic legislation, the echo of *Dred Scott. Allgeyer* was succeeded within a decade by *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), and the era to which that case gave its name, famous now for striking down as arbitrary various sorts of economic regulations that post-New Deal courts have uniformly thought constitutionally sound. Compare, *e.g., id.,* at 62, 25 S.Ct., at 545 (finding New York's maximum-hours law for bakers "unreasonable and entirely arbitrary"), and ***761** *Adkins v. Children's Hospital of D.C.,* 261 U.S. 525, 559, 43 S.Ct. 394, 401-402, 67 L.Ed. 785 (1923) (holding a minimum-wage law "so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States"), with *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 391, 57 S.Ct. 578, 581-582, 81 L.Ed. 703 (1937) (overruling